TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 149

ARMOUR & COMPANY AND ARMOUR & COMPANY OF TEXAS, APPELLANTS,

vs.

THE CITY OF DALLAS ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED JULY 29, 1920.

(27,224)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 469.

ARMOUR & COMPANY AND ARMOUR & COMPANY OF TEXAS, APPELLANTS,

vs.

THE CITY OF DALLAS ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1919.

1 *Caption.*

Be it remembered, that at a term of the District Court of the United States for the Northern District of Texas, begun and holden at Dallas, Texas, on the 5th day of May, A. D. 1919, the Honorable R. L. Batts, United States Circuit Judge for the Fifth Circuit, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

No. 2843/99. Equity.

ARMOUR & COMPANY ET AL.

VS.

THE CITY OF DALLAS ET AL.

2 *Original Bill.*

Filed December 21, 1918.

To the Honorable the Judge of said Court:

Armour and Company and Armour and Company of Texas bring this their bill of complaint in equity against the City of Dallas, the Texas & Pacific Railway Company, Pearl Wight as receiver of the Texas & Pacific Railway Company, and Wholesale District Trackage Company and respectfully represent:

1. Plaintiff, Armour and Company, hereinafter designated as Armour of New Jersey, is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, whereof it is a resident and citizen.

2. Plaintiff, Armour and Company of Texas, hereinafter designated as Armour of Texas, is a corporation duly incorporated under and by virtue of the laws of the State of Texas, whereof it is a resident and citizen.

3. The defendant, Texas & Pacific Railway Company, hereinafter designated as the Railway Company, whereof John L. Lancaster who resides in the said City of Dallas is president, is now and was upon all of the dates hereinafter mentioned, a corporation duly created by and existing under the laws of the United States of America, having a line of railway extending into and through the City of Dallas, Dallas County, Texas.

4. The defendant, Pearl Wight, and said John L. Lancaster were by an order of the District Court of the United States within and for the Western District of Louisiana, Monroe Division, of date October

27, 1916, duly and legally appointed receivers of all and singu-
3 lar the railroads, lands, assets, rights, liens, claims, interests, franchises and property, real, personal and mixed, of whatsoever kind and description and wheresoever located or situated of the said railway company and they duly qualified as such receivers under the said order, and thereafter the said John L. Lancaster resigned as co-receiver and the said Pearl Wight, who resides in the City of New Orleans, in the Parish of Orleans, in the State of Louisiana, became and now is sole receiver, with offices and agents in the City of Dallas upon whom service herein may be made.

5. The said defendant, Wholesale District Trackage Company, is a corporation duly incorporated under and by virtue of the General Laws of the State of Texas, with its domicile and principal office in the said City of Dallas.

6. The defendant, the City of Dallas, is a municipal corporation, duly organized and incorporated under various special acts of the legislature of the State of Texas and amendments thereto, with its principal office and domicile in the said City of Dallas, whereof Joe E. Lawther is mayor and the following are commissioners, to wit: T. J. Britton, O. H. Lang, A. C. Cason and Wm. Doran.

7. This suit is one of a civil nature, cognizable in equity and the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars; and the grounds upon which the jurisdiction of this court in this cause depends are certain rights, privileges and immunities arising under and protected by certain provisions of the Constitution of the United States, hereafter more particularly and explicitly set forth.

8. Plaintiffs now show that the said Railway Company owns, and, prior to the time of the appointment of the receivers as aforesaid, operated a line of railway extending from the City of New
4 Orleans to the state line of Texas and Louisiana and from said state line East and West through the State of Texas, traversing the City and County of Dallas in the State of Texas. That in 1872 the said Railway Company built and operated its line of railway on what was then, and is *now*, known as Pacific Avenue in the City of Dallas for a distance of some two miles East and West. At that time what is now the City of Dallas was a village consisting principally of a courthouse square with some primitive buildings surrounding the same. The use, appropriation and occupation by the said Railway Company of said Pacific Avenue was then, there and ever thereafter in all respects lawful. The said village of Dallas eventually grew into a town and the town into the existing city. Its growth was conformable with the location of said railway company and extended from the Trinity River in an Easterly direction along those certain principal streets known as Elm, Main and Commerce, all of which are parallel to the said Pacific Avenue. The said Pacific Avenue because of the location of the tracks of the said railway company thereon became, was and still is, devoted to industrial enterprises requiring

switch tracks and shipping facilities and same were then and ever thereafter served by side tracks and switching facilities afforded by the said Railway Company under and by virtue of appropriate ordinances of the said City of Dallas authorizing the same, whereas the other streets hereinbefore named were and are devoted to wholesale and retail purposes. Prior to April 12, 1890, said Railway Company had only a single main line track on said Pacific Avenue which was then, and is now, eighty feet wide, and at that time the demands of the industrial enterprises which had been built up on said Pacific Avenue in consequence of the location of the tracks of said railway company thereon became so numerous as in part to necessitate the building and operating of a double main line track by the said railway company on the said Pacific Avenue. On said April 12, 1890,
5 the said Railway Company filed with and presented to the mayor and aldermen of the said City of Dallas, Texas, a certain petition for a franchise to construct, maintain and operate double tracks on said Pacific Avenue, a copy whereof is attached hereto, marked Exhibit "A" and made a part hereof. Said petition was so filed and presented in order to enable the said Railway Company to comply with the demands of the growing industrial and business interests of the said City of Dallas and more especially those located on said Pacific Avenue and in its said petition said Railway Company for the purpose of inducing the requested and requisite franchise to be extended to it by the said City of Dallas for a term of fifty years, offered on its part to so reconstruct its tracks on said Pacific Avenue as to conform to the requirement with respect to the grade thereof as shown by a profile prepared by the city engineer of the City of Dallas and further that said Railway Company at its own expense would macadamize that portion of said Pacific Avenue to be occupied by said double tracks and the space between the same and to the ends of the ties; and in addition thereto should the said Pacific Avenue, which was then unpaved, be thereafter paved, the said Railway Company would pay one-half of the cost of paving with bois d'arc blocks on each side of said double tracks between the curb and the ends of the ties from the intersection of Griffin street and Pacific avenue to the intersection of the main line of the Houston & Texas Central Railway Company located on what is known as Central Avenue with the said Pacific Avenue, and in addition thereto would pay one-half of the cost of the stone curbing to be constructed on the aforesaid part of Pacific Avenue in connection with said paving. In addition thereto the said Railway Company further offered to construct adjacent to its tracks on Pacific avenue and between Lamar and Griffin streets a substantial brick depot between forty and fifty feet
6 wide and four hundred and eighty feet long, embracing warehouses and necessary offices. The franchise so applied for was also to contain a grant by the said City of Dallas to the said Railway Company of the right to construct and operate certain side tracks, switches, etc. Thereafter the said mayor and aldermen, constituting the then City Council of the said City of Dallas, being duly and legally authorized so to do by the Constitution and laws of

the State of Texas, enacted, and on April 14, 1890, duly approved that certain ordinance in response to the prayer of said petition of the said Railway Company, a copy whereof is hereto attached, marked Exhibit "B" and made a part hereof. Said ordinance granted the right, power and franchise to the said Railway Company to lay a double track through the said City of Dallas on and along Pacific avenue and to maintain and operate thereon said double track for the full term of fifty years from and after the said 14th day of April, 1890, and said ordinance is now valid and subsisting. It was in said ordinance provided that the said Railway Company should so reconstruct its tracks on said Pacific avenue as to conform to the requirement with respect to the grade as shown by a certain profile prepared by the city engineer of the said City of Dallas and it was further provided that after said double tracks should be laid the said city engineer should inspect the same and report thereon in writing to the City Council and that said report when adopted should be conclusive evidence that the tracks had been reconstructed and lowered as required by the said ordinance. It was further provided that the said Railway Company when it should construct said double track should at its own expense macadamize that portion of said Pacific Avenue occupied by said double tracks and the space between the same and to the ends of the ties and that whenever the said City of Dallas should cause said Pacific avenue, which was then unpaved, to be paved with *laid d'are blocks*, said Railway Company should pay one-half of the cost of such paving on each side of said double tracks to the ends of the ties on that part thereof between its intersection with said Griffin street and Central Avenue and that said Railway Company should pay in addition thereto one-half of the stone curbing to be constructed on said part of said Pacific Avenue in connection with said paving. It was further provided in said ordinance that the said Railway Company, within twelve months, should erect, construct and maintain adjacent to its tracks fronting on Pacific Avenue, between Lamar and Griffin Streets, a substantial brick depot between 40 and 50 feet wide and 480 feet long, etc. It was further provided in said ordinance that said Railway Company should file with the said city secretary of the City of Dallas within thirty days from the passage of the ordinance its written acceptance of the same and said ordinance was granted upon the condition that the said Railway Company should do and perform all things therein provided by it to be performed. Thereafter on May 14, 1890, and within thirty days from the approval of the aforesaid ordinance, the said Railway Company accepted the said ordinance and duly filed its written acceptance thereof with the city secretary of the said City of Dallas. Thereafter the said Railway Company at great expense to itself constructed the said double tracks on said Pacific avenue, conformed the grade thereof in accordance with a requirement of the said city engineer, macadamized that portion of Pacific Avenue occupied by its said double tracks and between said tracks and up to the ends of the ties, built within the time prescribed the said promised station or depot and in all things complied with each and every

obligation devolving upon it under and by virtue of the aforesaid ordinance. Thereafter said City of Dallas paved the said
8 Pacific avenue with lois d'arc blocks and constructed the curb above specified and thereupon the said Railway Company, as it had covenanted so to do, paid one-half of the entire cost thereof and thereupon the said ordinance or franchise so legally granted as aforesaid became, was and still is, a valid, subsisting, irrevocable contract by and between the said Railway Company and the said City of Dallas and vested the right to the said Railway Company to the use and appropriation of the said Pacific Avenue and such right will continue to exist until, to wit the 13th day of April, 1940, and there exists no legal or other right upon the part of the said City of Dallas or any other authority to impair, much less to destroy, said vested right of said Railway Company. Said vested right of the said Railway Company is protected by that part of the Fourteenth Amendment of the Constitution of the United States which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and such right is further protected by that portion of the Fifth Amendment of the Constitution of the United States which provides: "No person * * *, shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation," and such vested right is further protected by that portion of section X of Article 1 of the Constitution of the United States, which provides: "No state shall * * * pass any * * * law impairing the obligation of contracts."

8. On April 4, 1912, plaintiff, Armour of New Jersey, being then and there duly and legally authorized to do business in the State of Texas, was desirous of acquiring, constructing and maintaining a plant in the City of Dallas so located as to be accessible to and to be served by a sidetrack and switching facilities and in pursuance of that desire and purpose, J. Ogden Armour, acting for and on
9 behalf of said plaintiff, conditionally contracted with the owners thereof for the purchase of that certain lot at the Northwest corner of Pacific avenue and Harwood street in the said City of Dallas which is particularly described as follows, to-wit:

"Beginning at the N. W. corner of Pacific Avenue and Harwood street; thence N. 52 deg. 24 min. W., along the S. W. line of Harwood Street, 177' 8½" to a point in the S. E. line of Live Oak Street; thence S. 45 deg. 30 min., W. along the S. E. line of Live Oak Street, 53' 6" to the N. E. corner of the Hauck property; thence S. 44 deg. E., 129 feet to the N. W. line of Pacific Avenue; thence N. 76 E. along the said N. W. line of Pacific Avenue, 93' 6" to the place of beginning."

The condition upon which such contract for the purchase of said lot was to be consummated was as follows:

"It is further understood and agreed that this contract is contingent upon the said party of the second part" (J. Ogden Armour) "secur-

ing from the city of Dallas a permit for a switch from the Texas & Pacific R. R. Co., tracks to the property above described, and the agreement to construct, and the construction and maintenance of same by the said Texas & Pacific R. R. Co., and if the said party of the second part is unable to secure a permit or ordinance from the City of Dallas for the construction and maintenance of said switch, or the agreement to construct and maintain, and the construction of same by the said Texas & Pacific R. R. Co., then this contract is, at the option of the party of the second part, to be terminated and there is to be returned to him all money paid to the parties of the first part under the terms of this agreement."

Both the Railway Company and the City of Dallas knew at the time that the said contract for the purchase of said lot was conditioned as aforesaid. Said conditional contract to purchase would not have been consummated had not the City of Dallas agreed to
10 grant a franchise for a switch to serve the plant to be erected upon said lot and had not the said Railway Company agreed to construct, maintain and operate such switch track, and both the Railway Company and the said City of Dallas knew that fact. Prior to the consummation of the aforesaid conditional contract to purchase said lot, said plaintiff acquainted J. W. Everman, the then superintendent of said Railway Company, at its general offices in the City of Dallas, with the situation and the said Everman looked over the said lot and the surroundings and assured said plaintiff that in the event the said City of Dallas should grant a franchise for a switch track to extend to said lot to serve the plant to be erected thereon and should said plaintiff consummate its aforesaid conditional contract of purchase, then the said Railway Company would construct, maintain and operate a switch or spur track from its main line to serve said property. Thereupon the said plaintiff caused the then mayor and commissioners of said City of Dallas to inspect said lot and all of the surroundings with a view of having them determine whether or not the said City of Dallas would grant a franchise for the switch or spur track as aforesaid, and the said mayor and board of commissioners of the said City of Dallas, having so inspected said premises, did assure said plaintiff that, if it would acquire said lot and dedicate certain specified portions thereof to the public for street purposes, a franchise for the desired switch or spur track would be granted. J. E. Lee, the then commissioner of streets and public property of the City of Dallas, reported unto the Board of Commissioners of the City of Dallas which duly adopted and confirmed his report, said report being as follows:

"Reporting on the petition of the Texas & Pacific Railway Company, Armour and Company, Almyra Hays and Mrs. Mary Hauck, property owners in the block on the north side of Pacific avenue, between Harwood and Live Oak streets, petitioners, asking the
11 City that a switch be laid on the north side of Pacific avenue, between Harwood and Live Oak streets, I wish to report that, since this switch track, as shown by the attached plat, does not cross either Harwood or Live Oak streets, and, since the people on the south side in this particular block enjoy switch track facilities, I deem

that there is nothing inconsistent to the public interests for the Board to grant this petition for a switch extending from Harwood to Live Oak street on the north side of Pacific avenue, as per a blue print attached. I therefore recommend that the petition be granted, and I further recommend that the city attorney be directed to prepare an ordinance which shall contain all of the usual provisions embodied in similar grants by this Board and in conformity with all of the provisions of the Charter."

In pursuance of the aforesaid assurance, both of the said Railway Company and of the said City of Dallas, said plaintiff consummated its aforesaid conditional contract for the purchase of said lot, paying in good faith therefor the sum of Fifty Thousand Dollars in cash, which, but for the assurance given, it would not have done. That in order to enable said plaintiff to make the dedication as aforesaid as a condition precedent to the granting of the said franchise for the said switch or spur track, it was, as both the said Railway Company and the said City of Dallas then and there well knew, necessary for said plaintiff to consummate its aforesaid conditional contract of purchase and to obtain the legal title to said lot, all of which the said plaintiff did and which but for the aforesaid assurances of the said Railway Company and the said City of Dallas it would not have done as both of them well knew. That in further pursuance of the mutual agreements by and between said plaintiff, the said Railway Company and the said City of Dallas the said plaintiff in good faith
12 made, executed and delivered its irrevocable deed of dedication whereby on July 1, 1912, it forever dedicated to the public use for street purposes 95 square feet of land, being parts of said lot so purchased by the said plaintiff and in accordance with the requirement of the said City of Dallas and in pursuance of the aforesaid understandings and agreements which the said plaintiff had with both the said Railway Company and the said City of Dallas.

9. Prior to and at the time of the granting of the ordinance or franchise for the said switch or spur track to extend from the main line on said Pacific Avenue to the said lot which was so purchased by the plaintiff, which ordinance is particularly set forth in paragraph 11 hereof, it was the purpose of the said plaintiff, as was then and there well known both to the said Railway Company and to the said City of Dallas, to erect on said lot at great expense a permanent building or plant and to conduct its business therein, which could not be conducted, as all parties then and there knew, at any place or location not served by a switch track and the said City of Dallas and the said Railway Company with full knowledge of all and singular, the facts herein set forth, stood by, permitted and encouraged the said plaintiff to erect on said lot a plant thereon as is hereinafter set forth. That in consummating the purchase of said lot and in making the irrevocable dedication of said portions thereof, as aforesaid, and in erecting thereon a permanent and expensive structure, the said plaintiff in good faith relied and acted upon all of the aforesaid agreements and assurances, both of the said Railway Company and the said City of Dallas, believing and having the right to believe

all of such representations, assurances and agreements to be true and to have been made in good faith, and without any cause to suspect bad faith or a contemplated breach of any agreement by either the said Railway Company of the said City of Dallas.

13 10. In pursuance of the aforesaid beliefs, assurances, representations and agreements, said plaintiff and the said Railway Company filed with and presented to the mayor and commissioners of the said City of Dallas their joint petition for a franchise for the construction, maintenance and operation of a switch or spur track to serve the said lot so purchased by the said plaintiff and the said plant to be erected thereon by it.

11. Thereafter, in pursuance of said plaintiff's said purchase of said lot and its dedication of said portions thereof, and in consummation of said initial and preliminary negotiations and mutual agreements, the said City of Dallas by and through its legally constituted authorities duly and legally enacted and on July 30, 1912, approved that certain valid and subsisting ordinance, a copy whereof is hereto attached, marked exhibit "C" and made a part hereof. Said ordinance was enacted and approved by and with the consent of said plaintiff, said Railway Company and said City of Dallas. It distinctly shows that the chief and moving consideration therefor emanated from the said plaintiff and said ordinance on its face shows that it was granted for the use and benefit of the said plaintiff and said ordinance constitutes a valid and subsisting tripartite agreement by, between and among the said plaintiff, the said City of Dallas and the said Railway Company. Said ordinance granted the said Railway company the right, privilege and franchise for a period of twenty years from July 30, 1912, to build, construct and operate a switch track on the North line of Pacific Avenue between the West line of Harwood street and the East line of Live Oak street and to operate its cars and engines thereover. Said switch track was to, and did, commence at a point on said Pacific Avenue 150 feet East of the line of St. Paul street and same
14 was to, and did, extend thence in an Easterly direction 315 feet to the West line of Harwood street and thence in a Westerly direction 225 feet from the point of intersection to the East line of Live Oak street.

Section 4 of said ordinance reads as follows:

"That in accordance with the agreement heretofore made between the City of Dallas and Armour & Co., the owners of a certain lot located on the North side of Pacific Avenue, and more particularly located on the Northwest corner of Pacific Avenue and Harwood Street and extending back to Live Oak Street, which switch-track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co., or the said Armour & Co. shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot where the same forms a corner of Harwood and Pacific Avenue, and shall likewise dedicate to public use for street purposes thirty-five square feet off the northeast corner of its

said lot where the same forms the southwest corner of Harwood Street and Live Oak Street, it being the purpose of the said dedication to round the corners at such points and to dedicate such property for street purposes, and it being understood that it requires the amount of square feet herein stated to round off said corners, all of which more fully appears from map on file in the office of the City Engineer of the City of Dallas. That the dedication of said property shall be made by the said Armour & Co., whose property is served by said switch, before the final acceptance of this ordinance by the grantee herein.

That in the event the said Armour & Co. should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and privileges granted under this ordinance, by resolution or otherwise."

15 In pursuance thereof and before the final acceptance by the said Railway Company, said plaintiff acting in all things in good faith and fully complying with all of the terms and conditions of said ordinance, did on July 1, 1912, make, execute and deliver its certain valid and irrevocable deed of dedication whereby it forever dedicated to the public use for street purposes the said 64 square feet of land and the said 35 square feet of land, both of which were then and there of great value and thereupon and ever since the public, accepting and acting upon said dedication, have used and appropriated said dedicated portions of said plaintiff's said lot for certain street purposes and said dedication is beyond the power of recall and there exists no power or authority by which the said land so dedicated can be re-acquired by the said plaintiff, nor can the said plaintiff be put in statu quo in regard thereto. The said Railway Company thereafter, on to-wit July 18, 1912, in pursuance of its aforesaid agreement with the said plaintiff so to do, duly accepted the said ordinance by a written acceptance filed with the city secretary of the said City of Dallas. Said plaintiff avers that the said ordinance was in all things in good faith fully complied with both by it and by said Railway Company and that the same became, was and is, a valid and subsisting irrevocable agreement by the said plaintiff, the said railway Company and the said City of Dallas upon valuable considerations, whereby and wherein said plaintiff acquired a vested right, the protection whereof is guaranteed to it under and by virtue of that provision of the Fourteenth Amendment of the Constitution of the United States which provides: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and said vested right is further protected by that part of the Fifth Amendment of the Constitution of

16 the United States which provides, "No person * * * shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation," and such vested right is further protected by that portion of Section X, Article 1 of the Constitution of the United States which provides, "No state shall * * * pass any * * * law impairing the obligation of contracts." Said

valid and subsisting ordinances or franchises will continuously remain so valid and subsisting until said July 17, 1932. Plaintiffs aver that whilst the said City of Dallas reserved the right to at all times amend or alter the said ordinance, it did not reserve, nor does it possess, the right to annul or repeal the same. Plaintiffs further aver that the said Railway Company has not been required to abandon and that there exists no law by which it can be required to abandon its tracks on Pacific Avenue, and plaintiffs further aver that the said Railway Company has not been required either to elevate its tracks on Pacific Avenue or to place the same in subways, and it further avers that in the event the said Railway Company shall be required to elevate or depress its tracks on Pacific Avenue, the switch or spur track serving its plant, as aforesaid, may likewise be elevated or depressed and thereby be made to continue to serve the said plant.

12. Plaintiffs now show that by an Act of the Legislature of the State of Texas, approved August 15, 1876, it was provided that:

"Every railroad company organized under this title shall make an actual survey of its route or line for a distance of twenty-five miles on its projected route, and shall designate the depot grounds along the said first twenty-five miles before the railroad is begun; and no railroad company shall change its route or depot grounds after the same have been so designated."

Said law remained and was in force during the years of
17 1912 and 1913, and was brought forward in identical language through all the various revisions of the laws of the said State of Texas, and now constitutes Article 6550 of the Revised Statutes of Texas of 1911.

Plaintiffs further aver that by an Act of the Legislature of the State of Texas, approved on the 3rd day of March, 1889, and amended on the 1st day of September, 1910, it was provided among other things as follows: "Nor shall the main track of any railroad once constructed and operated be abandoned or moved." The said law was valid and subsisting during the years 1912 and 1913, and same constitutes Article 6625 of the Revised Statutes of Texas of 1911.

13. Thereafter, in pursuance of and in reliance upon the promises aforesaid, the said plaintiff obtained at great expense, plans and specifications for the erection upon said lot of a permanent building, peculiarly and solely adapted to the requisites of its business, to be built upon that portion of its said lot which it had not theretofore dedicated to the public use as aforesaid. The work upon said building began on or about the 22d day of August, 1912, and the said building was completed on or about February 12, 1913. Said building, including the said architect's fees, draftsman's time and other necessary incidentals, cost the said plaintiff the sum of to-wit, $79,692.27, which together with the aforesaid cost of said lot made the said plaintiff's plant cost the sum of $130,260.80. Said building is an extensive, reinforced concrete structure, consisting of a base-

ment and three stories on said Pacific Avenue and two stories on Live Oak street and is exclusively adapted to the refrigeration, smoking, drying, treatment and curing of meats, such as are usually and customerily vended by the said plaintiff, and said building is essential and valuable to the prosecution of the business conducted by the said plaintiff and by its said co-plaintiff as lessees as hereinafter
18 more particularly mentioned, but said building is neither adapted nor adaptable to the conduct of any other kind or character of business and is valueless except for the use in the said business to which alone it is adpated. Said building is a permanent reinforced concrete structure and is monolithic in character. It occupies all the undedicated portion of said lot. It comprises divers and sundry concrete vaults and a complete and complex system of machinery and refrigerating pipes, vats, etc. and vaults in which meats are dried, cured, smoked and refrigerated. Each of the concrete floors in said building is on different grades. The interior of said building is such as to preclude its use for any business other than that for which it is designed and any removal of or attempted change in the interior of said building would necessarily result in a ruinous deterioration of the exterior thereof.

14. Plaintiffs now show that whilst said building was being erected on said lot the said Railway Company in pursuance of its aforesaid previous agreement with said plaintiff so to do and in pursuance of the aforesaid ordinance and its acceptance thereof, constructed a switch or side track in accordance with said ordinance and operated its engines and cars thereover continuously ever since and is now operating the same, but the defendants herein conspiring and confederating together are threatening to remove said switch and to abandon the operation of same and to disconnect and take up the same as is hereinafter more specifically set forth, and this without making or offering to make to either of the plaintiffs herein any compensation whatever for the large and irreparable damage which they will sustain by such illegal act, should it be accomplished.

15. Plaintiffs now aver that on heretofore, to-wit: Dec. 10, 1914,
19 the said plaintiff Armour of New Jersey, demised all and singular its said plant to the said plaintiff Armour of Texas upon a consideration that the said lessee should pay to the said lessor, during the term of the lease, an annual rental in equal monthly installments, consisting of eight per cent of the appraised value of said plant, as shown by the books of Armour of New Jersey, the lessee; to pay all taxes, water rents, and other assessments made against the said property, and to keep the same in good condition and repair. Said lease was for a term of one year, but by renewals has been kept in force and is now existing.

16. Plaintiffs now aver that the magnitude and volume of business transacted at the said plant has required and will continue to require, the moving on the said switch or side track on an average of 600 freight cars per annum, and that the amount of the business transacted is approximately $2,000,000.00 per annum, and that the transaction of said business has been and is profitable, and, as plaintiffs

aver, will continue to be profitable unless destroyed by the threatened illegal acts of the defendants hereinafter set forth and complained of.

17. Plaintiffs now aver that the removal, either of the main tracks of the said Railway Company traversing the said Pacific Avenue, or of the said switch track which serves the said plant as aforesaid, or the discontinuance of the operation of either, would result in putting the said plant out of commission, and would render a further prosecution of the said business impossible, and also would render the said structure, which is permanent in its nature, worthless.

18. Plaintiffs now show that such has been the advance in material and labor that it would now cost the plaintiffs to replace said structure at another location seventy-three per cent more than the erection of the said structure cost when it was built, as aforesaid, or the sum of, to-wit $109,178.41.

20 19. Plaintiffs now show that to subserve their own purposes and to obtain considerations and compensations satisfactory to themselves, said defendants, conspiring and confederating together, have been planning and are now threatening voluntarily to remove and unless restrained from so doing, will voluntarily remove all and singular the tracks of the said Railway Company from that portion of Pacific Avenue which extends from Lamar Street to Central Avenue, a distance of about 4,380 feet and on and opposite to which said plaintiff's plant is located. The scheme which has been set on foot and which unless restrained will result in such removal of the tracks, including the said switch or spur track serving the plaintiff's said plant, is in substance as follows, to-wit: Said Railway Company and its receiver are to segregate the said Railway Company's main line of railway by the removal from Pacific Avenue as aforesaid of 4,380 feet of its said double track, leaving its said main line of railway which is now being operated and has for more than forty-five years last past been continuously operated on said Pacific Avenue, cut into two disconnected parts or segments. In order to obtain a connection for the aforesaid segregated portions of its main line said railway company and its receiver have entered into a contract with the Houston & Texas Central Railway Company whereby the latter is to construct a circuitous line of railway from a point on the line of said railway company East of the Trinity River to what is known as White Rock Creek, East of the said City of Dallas another point of said Railway Company's line, a distance about seven miles. The said Railway Company and its said receiver are not to own and will not own either in whole or in part the said circuitous line of railway upon which they, in the event of the consummation of the threatened removal, will be solely dependent, but an operating agreement, the exact character and nature of which is unknown to plaintiffs, has been effected by and between the
21 said Railway Company and its said receiver and the said Houston and Texas Central Railway Company whereby it is contemplated that in pursuance of the threatened removal of the said Railway Company's tracks from Pacific Avenue and the con-

struction of the said circuitous line around the City of Dallas by the said Houston & Texas Central Railway Company the said Railway Company and its receiver will detour its trains over said circuitous route by paying the interest on an agreed valuation of the cost of the construction of said circuitous line of railway.

20. Plaintiffs aver that the said Pearl Wight as receiver of the said Texas & Pacific Railway Company has not repudiated, cancelled or rescinded the aforesaid valid and subsisting contract whereby the said Railway Company covenanted with said plaintiff to maintain and operate said switch. Plaintiffs aver that they are large shippers and that ever since the said switch track was put in to serve their said plant they have shipped approximately seventy-five per cent of all the commodities vended by them over said Railway Company notwithstanding there exists and during all of that time there existed, a number of competing lines of railway. Plaintiffs aver that their business is exceedingly valuable to the said Railway Company and to its said receiver, and that the said Pearl Wight as receiver of said Railway Company has not repudiated or rescinded the aforesaid contract of the said Railway Company with the said plaintiff Armour of New Jersey and that but for the scheme herein set forth to remove all of the tracks from Pacific Avenue as aforesaid, the said Pearl Wight as receiver of the said Railway Company would not repudiate or rescind said contract, but would continue to recognize, as ever since his appointment as receiver he has recognized, both the validity of said contract of the said Railway Company with said plaintiff Armour of New Jersey and the fact that the same is beneficial both to the said Railway Company and to him, the
22 said Pearl Wight as receiver thereof.

21. Plaintiffs now show that in pursuance of a confederation and conspiracy by, between and among the defendants hereto, they caused to be prepared for execution by all of them that certain contract, a copy of which is hereto attached, marked exhibit "D" and made a part hereof.

Plaintiffs now show that on heretofore, to-wit August 23, 1918, the said defendants in further pursuance of their confederation and conspiracy to subject plaintiffs to irreparable loss and damage, did, co-operating together, contrive to have the Board of Commissioners of the said City of Dallas in open session and in the exercise of legislative power to pass that certain resolution which reads as follows:

"Whereas, an agreement and contract between the Wholesale Trackage Company, a corporation, organized and existing under and by virtue of the laws of the state of Texas, and Pearl Wight, as receiver of the Texas & Pacific Railway Company, and the Texas & Pacific Railway Company, a railway corporation, duly incorporated, and the City of Dallas relating to the removal of the tracks of the Texas & Pacific Railway Company and said receiver from Pacific Avenue, this day read in open session of the Board of Commissioners of the City of Dallas, and;

Whereas, said contract is fully understood and the terms thereof consented to and approved by the Board of Commissioners of the City of Dallas.

Now, therefore, the Board of Commissioners of the City of Dallas here now authorizes and directs the Mayor of the City of Dallas to sign and execute said contract, there being four copies of same, for and — behalf of the City of Dallas, and that the Secretary of the City of Dallas be, and he is here now also authorized, empowered and directed to sign said four contracts as Secretary of the
23 City of Dallas."

(Signed) "WM. DORAN,
Comr. of Finance & Revenue."

Approved: August 23, 1918.

(Signed) "JOE LAWTHER,
Mayor."

In pursuance of said resolution the said defendant, the City of Dallas, by and through its mayor and secretary, immediately thereafter on to-wit, August 23, 1918, executed the said contract, a copy whereof is hereto attached, marked exhibit "D" and made a part hereof, being the same contract referred to in said resolution. Plaintiffs aver that the said resolution and the said contract executed in pursuance thereof are illegal and void and that the passage of the said resolution and the execution of the said contract in pursuance thereof by the defendant, the City of Dallas, operate to deprive plaintiffs of their property without due process of law and such acts are violative of that part of the Fourteenth Amendment of the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and such acts impair and destroy the vested rights of plaintiffs existing under and by virtue of that certain ordinance of the city of Dallas a copy whereof is hereto attached, marked exhibit "C" and made a part hereof, and the passage of said resolution and the execution of said contract in pursuance thereof by said defendant, said City of Dallas, is violative of that provision of clause 1 of section X of Article 1 of the Constitution of the United States which provides: "No state shall * * * pass any * * * law impairing the obligation of contracts." Said ordinance or resolution above set forth was enacted, passed and adopted and the said contract made exhibit "D" hereto was executed by the defendant, City of Dallas, without any notice whatever to, or any appearance of plaintiffs or either of them, and without any opportunity being afforded to either of them to be heard and same was brought about by the active co-operation and conspiracy of all the defend-
24 ants herein, each and every of them then and there well knowing that if said ordinance or resolution and the said contract in pursuance thereof were permitted to become effective and to be executed and carried out, would impair and destroy the

fixed and vested contractual rights of plaintiffs to their irreparable detriment.

Plaintiffs now aver that the enactment and passage of said ordinance or resolution and the execution of the said contract made exhibit "D" hereof by the defendant, City of Dallas, operate to deprive plaintiffs of their property without due process of law and to impair the obligation of the previously existing contract between them, the said Railway Company and the said City of Dallas aforesaid, and they aver that all of such acts are illegal and that each and every of the defendants should be forthwith and forever restrained and enjoined from proceeding to execute, carry out or put in force the terms of the said illegal resolution or ordinance and the said contract made exhibit "D" hereto.

22. Plaintiffs aver that by the terms of said contract made exhibit "D" hereto the defendant City of Dallas purposes, covenants, promises and undertakes among other things to pay to its co-defendant, Wholesale District Trackage Company, the sum of $100,000.00 in consideration for certain real estate to be conveyed to it by its said co-defendant, Wholesale District Trackage Company, as is provided for in Section 2 of Article 1 of said contract. That the payment of the said $100,000.00 by the defendant City of Dallas has not been made and should not be permitted to be made because the payment thereof by the said City of Dallas constitutes a part of the consideration upon the part of the said City of Dallas as an inducement to its co-defendants to cooperate to violate, interfere with, impair and destroy the aforesaid vested contractual rights of these plaintiffs,
both with the said Railway Company and the said City of
25 Dallas. Plaintiffs now show that by the then and now existing charter of the City of Dallas it is provided that "no contract shall be entered into by the Board of Commissioners until an appropriation has been made therefor," and plaintiffs aver that no appropriation has been made of the sum of $100,000.00 or any other sum with which to liquidate said contract, and that said purported contract is illegal and void because it exceeds the charter powers of the defendant, City of Dallas.

23. Plaintiffs now show that immediately West of Preston Street in the said City of Dallas and on the said Pacific Avenue is located the plant of the Fulton Bag & Cotton Mills; that Preston Street is one of the main and principal thoroughfares of the said City of Dallas which crosses Pacific Avenue; that on Preston Street there exists and is being continuously operated a double track electric street railroad; that there now exists, and for some years past has existed, a side track making off of the main line of the said Railway Company on Pacific Avenue which serves the plant of the said Fulton Bag & Cotton Mills; that said side track or switch makes out from the main line of the said Railway Company on Pacific Avenue East of the said Preston Street and crosses the same and extends to the said plant of the said Fulton Bag & Cotton Mills, notwithstanding which and in palpable discrimination of the rights of plaintiffs, the defendants herein under and by virtue of the said contract made Exhibit "D"

hereto have expressly covenanted that the said side track or switch serving the said plant of Fulton Bag & Cotton Mills shall remain undisturbed and shall continue to be operated for a period of five years. In this connection plaintiffs aver that it is entirely practical for the said switch or side track serving the said plant of the Fulton Bag & Cotton Mills to be so extended as to serve the plant of these plaintiffs and that without any public or other detriment whatsoever, and that the defendants willfully decline to so extend said switch track as to afford these plaintiffs or either of them shipping facilities or
23 to provide them with any shipping facilities or side track service whatsoever.

24. Under and by virtue of said contract made Exhibit "D" hereto, the defendant, Wholesale District Trackage Company, covenants and agrees to convey to the said Railway Company or its said receiver certain real property therein referred to. Such conveyance has not been made and should the same be made it would constitute a part and parcel of the illegal consideration, the inducing cause for the cooperation of the other defendants with it to maliciously interfere with plaintiffs' valid and subsisting contractual rights as aforesaid, and plaintiffs aver that such threatened conveyance by the said Wholesale District Trackage Company to the said Railway Company and its said receiver, or to one or to the other, should be forthwith and forever restrained and enjoined.

25. By the terms of said contract made Exhibit "D" hereto the said Railway Company and its said receiver covenant to voluntarily abandon the use of all the said tracks on the said Pacific Avenue. Such threatened abandonment has not as yet occurred, but such threat will be put into execution unless restrained and such threat if executed would operate a malicious interference with and destruction of plaintiffs' valid and subsisting contractual rights as aforesaid with both said Railway Company and said City of Dallas and they therefore aver that such threatened voluntary abandonment and removal of the tracks from Pacific Avenue should be forthwith and forever restrained and enjoined.

26. Plaintiffs aver that by the terms of said contract made Exhibit "D" the defendant, City of Dallas, covenants that it will hereafter enact, pass and approve certain ordinances therein specified. That none of said ordinances have been passed or enacted, but their enactment, passage and approval is contemplated and plaintiffs aver that such contemplated action on the part of the defendant City of
27 Dallas should be forthwith and forever enjoined because such contemplated action constitutes in part the moving consideration and the inducing cause for the malicious interference by all the defendants herein with the valid and subsisting contractual rights of plaintiffs as hereinbefore set forth.

27. Plaintiffs aver that the passage of said resolution and the execution of said contract made Exhibit "D" hereto constitutes an

illegal, malicious and unjustifiable interference with the valid and subsisting contractual rights of plaintiffs with the said Railway Company and the said City of Dallas and that said resolution and said contract should be annulled, rescinded, cancelled, set aside and held for naught.

28. Plaintiffs aver that on March 4, 1918, the said Railway Company and its said receiver joined by J. L. Lancaster, who was then a co-receiver of said Railway Company, upon their own initiative, and cooperating and confederating with their codefendants herein, voluntarily filed with the Railroad Commission of Texas their joint petition wherein they prayed the said Railroad Commission of Texas to pass an order permitting the said Railway Company and its said receiver to remove all and singular the tracks of the said Railway Company from Pacific avenue between Griffin street and Harwood street in the said City of Dallas. Thereafter on, to wit: March 15, 1918, the said Railroad Commission of Texas, in compliance with the prayer of the said petition, granted and passed an order authorizing and permitting the Texas & Pacific Railway Company and J. L. Lancaster and Pearl Wight receivers thereof to abandon and remove the railroad tracks now located upon Pacific avenue in the City of Dallas, Texas, between Preston street and Griffin street, and plaintiffs charge that said petition was filed with the said Railroad Commission and the aforesaid order of the said Railroad Commission was granted and passed without any notice whatever to plaintiffs, or either of them, neither of them appearing therein nor being afforded
28 any opportunity whatsoever to be heard therein and said Railroad Commission had no jurisdiction to hear them, and plaintiffs charge that said order of the said railroad commission operates to deprive plaintiffs of their property without due process of law and to impair the obligation of their aforesaid pre-existing contract with the said City of Dallas and with the said Railway Company, and they, therefore, aver and charge that the said order of the said Railroad Commission of Texas is wholly and totally void because it violates that provision of Section 1 of the 14th Amendment to the Constitution of the United States which provides that: "Nor shall any State deprive any person of life, liberty or property without due process of law," and said order of said Railroad Commission of Texas is and was wholly void because it violates and contravenes that portion of clause 1 of section X of article 1 of the Constitution of the United States which provides: "No State shall * * * pass any * * * law impairing the obligation of contracts."

29. Plaintiffs aver that by an act of the Legislature of the State of Texas, approved March 22, 1918, and which became a law on June 27, 1918, it was provided that, upon the compliance with certain conditions therein specified and not necessary here to be set forth, any railroad, corporation, or any receiver thereof desiring to change, relocate or abandon any part of its line within any incorporated City containing 50,000 or more inhabitants should be permitted so to do.

The said City of Dallas now contains, and prior to March 22, 1918 contained, more than 50,000 inhabitants. Section 4 of said Act reads as follows:

"All changes, relocations and abandonments of parts of their lines by railroad corporations or receivers of any railroad in or adjacent to any city having a population according to the United States census of 50,000 inhabitants or over, heretofore made with the permission of the Railroad Commission of Texas or authorized by its written order, are hereby validated and made legal as fully as if made under the provisions of this Act, and such permission or written order of the Railroad Commission of this State, given prior hereto, shall be full power and authority to a railroad corporation or Receivers of any railroad to make such change, relocation or abandonment of parts of its line; providing that this Act shall not affect any right or rights for damages that any person, firm or corporation may now have, may have had or may have in the future for damages caused by any such removal, change or abandonment."

Plaintiffs aver that the intent and purpose of the Legislature of the State of Texas in enacting said section 4, above quoted, was to ratify, confirm and vitalize the aforesaid order made by the said Railroad Commission of Texas on March 15, 1918, herein referred to in next preceding paragraph hereof, and which was void because said Railroad Commission had not the jurisdiction or authority to make it.

Plaintiffs now charge that the said act of the Legislature of the State of Texas, approved March 22, 1918, and especially the said section 4 thereof hereinabove quoted were and are wholly and totally void because the same operates to deprive them of their property without due process of law, and to impair the obligation of their previously existing valid contract with the said Railway Company, and with the said City of Dallas, and plaintiffs aver that the said act of the Legislature of Texas, approved March 22, 1918, was and is wholly and totally void because it violates that provision of Section 1 of the Fourteenth Amendment of the Constitution of the United States which provides that: "Nor shall any State deprive any person of life, liberty or property without due process of law," and said law is and was wholly void because it violates and contravenes that portion of clause 1 of section X of article 1 of the Constitution of the United States which provides: "No State shall * * * pass any * * * law impairing the obligation of contracts."

30 Plaintiffs now aver that they are, as is well known to all of said defendants, wholly dependant for the operation of said their plant upon the continued maintenance and operation of said railway and their said switch track on said Pacific Avenue, and that in the event of the abandonment and removal thereof no substitute or other switch or switching or shipping facilities can be secured by them for the said plant, and that the threatened abandonment and removal of said railway and said switch, if consummated, will necessarily put plaintiff's said plant out of operation, and will render the said structure thereon valueless, and will force plaintiffs to select and acquire a new and different location and to erect thereon

a new plant at a greatly increased cost, as aforesaid, and, meantime, plaintiffs aforesaid valuable business will be interrupted and interfered with to their irreparable and unascertainable damage, for which they have no adequate remedy at law.

31. Plaintiffs now show that the aforesaid acts threatened to be committed by the said defendants, and which, unless they are restrained from so doing, they will commit, are, each and every of them, unlawful and if committed will result in irreparable and unascertainable damage to each and both of the plaintiffs.

32. Plaintiffs further aver that it is imperative that each and every of said defendants be forthwith and perpetually enjoined from the commission of each and every of the acts threatened by them to be committed and that they and each of them should be directed and commanded to forever desist from the commission of each, every and all of said unlawful acts so threatened by them to be committed, and that the said Railway Company be commanded, by mandatory injunction or other appropriate process, to continue to maintain said tracks and said switch track and the operation thereof to the
31 end that plaintiffs and each of them may be quieted in their enjoyment of their aforesaid vested and constitutional rights, and of this they pray.

33. Plaintiffs pray that the said defendants and each of them be forthwith and forever restrained and enjoined from the threatened execution and carrying out of the aforesaid illegal contract made exhibit "D" hereto and they further pray that the aforesaid illegal resolution passed by the said City of Dallas on August 23, 1918, be vacated, rescinded and held for naught and that each and every of said defendants, their agents, servants, attorneys and employees be forthwith and perpetually restrained and enjoined from committing or permitting to be committed any of the aforesaid illegal acts by them threatened to be committed.

34. Plaintiffs pray in the alternative that the damages sustained and to be sustained by each of them be ascertained and assessed and that the defendants be required and ordered to first pay the same to the respective plaintiffs, as their respective interests may appear, as a condition precedent and before the said defendants or either of them shall be permitted to abandon or to remove, or to cease to operate the said tracks and the said switch track which serves the said plaintiffs' plant as aforesaid, and plaintiffs further pray for all such other and further relief, both general and special, as under the facts they may be either in law or in equity entitled to, and as etc.

35. Plaintiffs pray that it may please Your Honor to grant unto the plaintiffs writs of subpoena to be directed to the said the City of Dallas, the Texas & Pacific Railway Company, Pearl Wight as receiver of the Texas & Pacific Railway Company, and Wholesale District Trackage Company, commanding them and each of
32 them, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable

Court, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answers under oath being expressly waived, and that upon a hearing hereof plaintiffs be awarded the relief prayed for by them hereinabove, and as etc.

RALPH W. SHAUMAN,
CAPPS, CANTEY, HANGER & SHORT,
ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

F. M. ETHERIDGE,
Counsel.

STATE OF TEXAS,
County of Dallas:

Frederick E. Tennant, being first duly sworn, deposes and upon oath states that he is an agent of Armour & Company of Texas, a private corporation duly incorporated under and by virtue of the General Laws of the State of Texas, and that as such agent he subscribes this affidavit for and in behalf of both of the plaintiffs; that he has read and is familiar with the allegations of the above and foregoing bill of complaint in equity and that the facts as therein stated are true, and that the facts as therein stated upon information and belief he verily believes to be true.

(Signed) FREDERICK E. TENNANT.

Sworn to and subscribed before me by the said Frederick E. Tennant on this 21st day of December, 1918.

[SEAL.]
ILA B. FAIN,
Notary Public in and for Dallas County, Texas.

33 EXHIBIT "A."

Petition of Texas & Pacific Ry. Co.

To the Honorable Mayor and Aldermen of the City of Dallas:

The Texas & Pacific Railway Company, through its President, Jay Gould, respectfully represents that in order to keep pace with the improvements of the City of Dallas and to meet the demands of the growing industrial and business interests of said City, and to afford prompt, efficient and satisfactory services petitioner is required to make extensive improvements and to materially increase its facilities for the conduct of its business. To that end petitioner submits its several propositions and presents its request for the rights and franchises necessary to enable it to accomplish said purposes as follows:

First. For the proper conduct of its business and to enable it to promptly perform its duties as a common carrier in said City petitioner requires a double railway track on Pacific Avenue through the said City of Dallas. Petitioner proposes that if the City of Dallas will grant the right to construct, own, maintain and operate said

double track on and along Pacific Avenue for the term of fifty years it will so reconstruct its present track on said avenue as to conform to the requirement with respect to the grade thereof as is shown by the profile prepared by the City Engineer and specified in the Ordinance recently passed by the Council, and will also, at its own expense macadamize that portion of said street occupied by said double tracks and the space between the same and to the end of the ties, and will, in addition thereto, pay one-half of the cost of paving Pacific Avenue with Bois d'arc blocks on each side of said double tracks to the end of the ties thereof between the intersection of the main line of the H. & T. C. Railway Company and Pacific Avenue, and will also, in addition thereto, pay one-half of the cost of the stone curbing constructed on that part of Pacific Avenue in connection with said pavement, provided the owners of real estate fronting on said street give their consent, evidenced in writing.

Second. Petitioner will construct adjacent to its tracks fronting on Pacific Avenue, and between Lamar and Griffin Streets in said City, a substantial brick depot between forty and fifty feet by four hundred and eighty feet, embracing warehouses and necessary offices. The plans of said building have not been made, but if these provisions are accepted it is designed to construct such a building as will be ample for the efficient accommodation of the commerce of said City handled by petitioner, and will be an ornament of its kind and a valuable acquisition to your City. This involves grant to your petitioner of necessary rights and franchises for the construction of side tracks and switches shown upon the blue print hereto attached and indicated by solid white lines, and the permits or other necessary grants for the construction of said building and appurtenances.

Third. Petitioner desires to acquire from the Missouri Pacific Railway Company all the rights and franchises granted by the City of Dallas to said Company specified in Article- 517, 518, 521, 522, 523, and 524 of the revised Ordinances of 1889 of the City of Dallas.

To that end the City of Dallas is requested to authorize, ratify
34 and confirm the conveyance of said rights and franchises which may be executed by the Missouri Pacific Railway Company to the Texas & Pacific Railway Company. The foregoing propositions are submitted together and it is understood that petitioner is not bound by either unless the whole is granted.

Your Honorable body is respectfully requested to act upon the same as promptly as practicable so that if the same are accepted petitioner may at once commence prosecution of the work in order to complete the same, if possible, before the commencing of the busy season.

THE TEXAS & PACIFIC RAILWAY COMPANY.
By JAY GOULD, *Its President.*

Alderman Crutcher moved to refer said petition to Committees — Streets & Bridges, Railways & Ordinances, they to report immediately—Carried.

An Ordinance entitled "An Ordinance granting to the Texas & Pacific Railway Company the right to lay a double track upon Pacific Avenue and construct certain side tracks upon compliance with certain conditions introduced and read First time.

Alderman Johnstone moved that the rules be suspended and ordinance read a second time by caption—Carried.

Rules Suspended.

Ordinance read a Second time by caption.

Ald. —— —— moved to amend said Ordinance by adding the words "and maintain"—Carried.

Ordinance now being on its Final passage.

Roll Call which resulted as follows:

Ayes—16.

Nays—0.

Absent—7.

35 EXHIBIT "B."

An Ordinance Granting to the Texas & Pacific Railway Company the Right to Lay a Double Track upon Pacific Avenue and Construct Certain Side Tracks upon Compliance with Certain Conditions.

Section 1. Be it ordained by the City Council of the City of Dallas. That right, power and franchise is hereby granted the Texas & Pacific Railway Company to lay a double track through the City of Dallas on and along Pacific Avenue, and to own, maintain and operate said double track on and along said Pacific Avenue for the term of fifty years from and after the passage of this ordinance.

Section 2. That the Missouri Pacific Railway Company is hereby authorized and empowered to convey to the Texas & Pacific Railway Company and the said Texas & Pacific Railway Company is hereby authorized to accept, use and enjoy all rights and franchises heretofore granted by the City of Dallas to said Missouri Pacific Railway Company is specified in Article- 517, 518, 521, 522, 523 and 524 of Revised Ordinances of 1889 City of Dallas (See Ordinance Book No. 6, page 342 seq.).

Section 3. Provided that all of the above rights, power- and franchises herein granted to the said Texas & Pacific Railway Company are subject to the following conditions, viz: That the said Texas & Pacific Railway Company shall so reconstruct its present track on said Pacific Avenue as to conform to the requirements with respect to the grade as is shown by the profile prepared by the City Engineer by which said profile the grade of the track of the Texas & Pacific Railway Company shall be so changed that when completed the top of the rail of said track shall be 3½ feet lower at the intersection of Pacific Avenue and Griffin Street and four feet lower at the intersection of Pacific Avenue and Akard Street, and — feet lower at the intersection of Pacific Avenue and Ervay Street than at present. That the grade of said track shall not be lowered further east than the intersection of Pacific Avenue and Harwood Street, at which place the

roadbed of said track shall be reduced to the smallest base consistent with skill and safety.

Section 4. That when said railway track is reconstructed and lowered in accordance with the preceding section of this ordinance, the City Engineer shall inspect the same, and if he finds that it has been reconstructed and lowered in accordance with this ordinance he shall so report in writing to the City Council, which report when adopted shall be conclusive evidence that said track has been reconstructed and lowered as required by this ordinance.

Section 5. Provided further that the Texas & Pacific Railway Company shall whenever it constructs said double track at its own expense, maçadamize that portion of said Pacific Avenue occupied by said double track and the space between the same and to the ends of the ties; and whenever the City of Dallas shall cause said Pacific Avenue to be paved with Bois D'arc — said The Texas & Pacific Railway Company shall pay one-half of the cost of such paving of each side of said double track to the end of the ties between the intersection of Griffin Street and Pacific Avenue and the intersection of the main line of the Houston & Texas Central Railway Company and Pacific Avenue, and will also in addition thereto pay for one-half of the cost of the stone curbing to be constructed on that part of Pacific Avenue in connection with said pavement.

36 Section 6. Provided further that the said The Texas & Pacific Railway Company shall within twelve months, erect and construct and maintain adjacent to its tracks fronting on Pacific Avenue and between Lamar and Griffin Streets in said City, a substantial brick depot between forty and fifty feet wide and 480 feet long, embracing warerooms and necessary offices; said building to be such as will be ample for the efficient accom-odation of the commerce of the City of Dallas handled by said The Texas & Pacific Railway Company, and right, power and franchise for that purpose is hereby granted said The Texas & Pacific Railway Company to construct side tracks and switches as shown by the blue print, and indicated thereon by solid white lines, attached to petition of said The Texas & Pacific Railway Company for the franchise granted by this Ordinance dated April 12, 1890.

Section 7. Provided that the Texas & Pacific Railway Company shall file with the City Secretary within 30 days from the passage of this ordinance its written acceptance of the same, that all rights, powers, privileges and franchises herein granted are expressly upon condition that said The Texas & Pacific Railway Company shall do and perform all things herein provided by it to be performed, and upon failure upon the part of said the Texas & Pacific Railway Company to perform the same or any part thereof, the said City of Dallas shall have power to cancel recall and revoke all said franchises and privileges herein granted.

Section 8. Provided further that this ordinance is granted subject to the existing Charter of the City of Dallas, and all future amend-

ments thereof pertaining to this subject and all existing and future ordinances of the City of Dallas regulating railroads.

Section 9. That all ordinances and parts of ordinances in conflict with this ordinance and particularly and ordinance passed April 5th and enrolled on April 7th, be and the same are hereby repealed.

Section 10. That this ordinance take effect from and after its passage.

Passed: April 12, 1890.

Correctly Enrolled: April 14, 1890.

SAM'L KLEIN,
Chairman Com. Municipal Records.

Approved: April 14, 1890.
W. C. CONNOR,
Mayor.

37 EXHIBIT "C."

An Ordinance Granting the Texas & Pacific Railway Company the Right and Privilege to Construct a Switch Track on Pacific Avenue, on the North Side of said Avenue, from the West Line of Harwood Street to the East Line of Live Oak Street.

Be it ordained by the Board of Commissioners of the City of Dallas:

Section 1. That the right, privilege and franchise be, and the same is hereby granted the Texas and Pacific Railway Company to build and construct a switch-track on the North Side of Pacific Avenue, between the West line of Harwood Street and the East line of Live Oak Street, or as more particularly hereinafter described, and to operate its cars and engines over the same, subject to the following conditions, a violation of any one of which or a misuse or abuse of same shall constitute a sufficient ground for the forfeiture of the entire right, privilege and franchise hereby granted, said conditions being as follows, to wit:

(*a*) Said switch-track hereby authorized shall be built and constructed on the North side of Pacific Avenue, commencing at a point on said Pacific Avenue 115 feet East of the East line of St. Paul Street, and thence extending in an Easterly direction 315 feet to the West line of Harwood Street; thence extending in a Westerly direction, 225 feet from the point of intersection to the East line of Live Oak Street.

(*b*) That the said switch-track shall be built and constructed under the supervision of the City Engineer, and to his satisfaction, and the grantee herein shall at all times, during the period of this grant,

conform the rails of the said track with the surface of the
38 street, and shall at all times operate its cars over the said track so as to interfere as little as possible with public travel on and along and across the said street.

(*c*) That the said grantee shall fully indemnify the City of Dallas against any and all damage, cost or expense, whether real or asserted, to any person or property, that may arise out of or be occasioned by the operation of its cars over the said track, or the maintenance of the said track, or that may grow out of or be occasioned by any defective condition that may exist in that part of the street lying between its rails and tracks and for two feet on either side thereof.

(*d*) That the said grantee shall never use the switch-track hereby authorized for the storing of cars, but the same shall be used only for the purpose of loading and unloading cars and cars shall be allowed to remain upon the said switch-track only during the time occupied in loading and unloading the same.

(*e*) That the said grantee shall exercise great caution and diligence to not unreasonably obstruct the public street while using the said track.

Section 2. That the right, privilege and franchise hereby granted is granted subject to the City Charter and ordinances of the City of Dallas and such future charters and ordinances as may hereafter be passed and the City expressly reserves the right to at all times amend or alter the ordinance hereby granted.

Section 3. That the right and privilege hereby granted is granted for a period of twenty years from the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate
39 or to place in subways said main tracks on Pacific Avenue, then in that event this franchise shall be subject thereto, and the said grantee shall, during said time, pay, on the second day of January in each and every year, the sum of Ten Dollars per year, as a bonus for the right, privilege and franchise hereby granted, provided that Ten Dollars shall be paid for the year 1912.

Section 4. That in accordance with the agreement heretofore made between the City of Dallas and Armour & Co., the owners of a certain lot located on the north side of Pacific Avenue, and more particularly located on the northwest corner of Pacific Avenue and Harwood Street and extending back to Live Oak Street, which switch-track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co. or the said Armour & Co. shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot where the same forms a corner of Harwood and Pacific Avenue, and shall likewise dedicate to public use for street purposes thirty-five square feet off the northeast corner of its said lot where the same forms the southwest corner of Harwood Street and

Live Oak Street, it being the purpose of the said dedication to round the corners at such points and to dedicate such property for street purposes, and it being understood that it requires the amount of square feet herein stated to round off said corners,—all of which more fully appears from map on file in the office of the City Engineer of the City of Dallas. That the dedication of said property shall be made by the said Armour & Co., whose property is served by said switch, before the final acceptance of this ordinance by the grantee herein.

That in the event the said Armour & Co. should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and
40 privileges granted under this ordinance, by resolution or otherwise.

Section 5. That the right, privilege and franchise hereby granted shall be accepted by the grantee herein within ten days from the date that the same becomes finally effective under the Charter, by the grantee making a written acceptance of same, and filing said written acceptance with the Board of Commissioners of the City of Dallas.

Section 6. That this ordinance shall take effect from and after its passage, as in the Charter in such cases made and provided.

Approved as to form:
JAMES J. COLLINS,
City Attorney.

Passed: July 10, 1912.
Correctly enrolled: July 30, 1912.

JAMES J. COLLINS,
City Attorney.
W. T. HENDERSON,
For Board of Commissioners.

Approved: July 30, 1912.
W. M. HOLLAND, *Mayor.*

41 EXHIBIT "D."

An agreement made and entered into this — day of ——, 1918, by and between the Wholesale District Trackage Company, a corporation organized and existing under and by virtue of the laws of the State of Texas (hereinafter sometimes referred to as the "Trackage Company"), party of the first part, and Pearl Wight as receiver of the Texas & Pacific Railway Company, appointed by the United States District Court for the Western District of Louisiana, and not as an individual (hereinafter sometimes referred to as the "Receiver"), joined herein by the Texas & Pacific Railway Company, a corporation organized and existing by virtue of an Act of Congress of the United States of America (hereinafter sometimes referred to as "The Railway"), parties of the second part, and the City of Dallas,

a municipal corporation organized and existing under and by virtue of the laws of the State of Texas (hereinafter sometimes referred to as "The City"), party of the third part:

Witnesseth, that

Whereas, the Railway owns and operates its double track main line of railway along and upon Pacific Avenue, between Griffin Street and Preston Street, in the City of Dallas, the maintenance and operation thereof, for a period of fifty (50) years ensuing from the 14th day of April, 1890, being under an ordinance of the city approved on said date, and under other claims of right thereon, and

Whereas, numerous wholesale establishments, warehouses and industrial plants are located on each side of Pacific Avenue, between Griffin Street and Preston Street, served by the tracks of the Railway maintained and operated by authority of various ordinances of the City, and

Whereas, by the terms of a certain contract between the Railway and the Union Terminal Company et al., approved by the
42 City by an ordinance passed December 1, 1912, the Gulf, Colorado & Santa Fe Railway Company asserts the right to operate certain of its passenger trains over the main line of the Railway along Pacific Avenue aforesaid; and

Whereas, the City and Trackage Company desire the removal of all of said tracks of the Railway on Pacific Avenue between Griffin Street and Preston Street, except the track serving the Fulton Bag & Cotton Mills, and to open and extend Pacific Avenue between Griffin Street and Lamar Street south of a line drawn parallel to and forty feet south of the north line of Pacific Avenue if extended westward in a straight line west of Griffin Street, and to have all tracks removed therefrom; and the Receiver and the Railway in view of such desire and the public demand therefor are willing, upon the terms and conditions hereof, to abandon the use of all of said tracks and to remove same, but subject to the claims of the Gulf, Colorado & Santa Fe Railway Company as herein recited.

Now, therefore, the parties hereto have agreed and do hereby agree as follows:

Article I.

For and in consideration of the faithful keeping of the covenants of the other parties hereto the Trackage Company hereby covenants and agrees as follows:

Section 1. (*a*) That it will promptly, and in any event within a period not to exceed one year from the date hereof, procure and convey or cause to be conveyed to a Trustee, selected by and acting for and in behalf of the Receiver or the Railway as the Receiver may direct and for the Trackage Company, but in trust nevertheless, all of the real estate required for the construction, maintenance and operation of tracks to serve an industrial district to be created in the City of Dallas, lying east of Lamar Street and west of Griffin Street between Camp Street and Ross Avenue; east of Lamar Street

43 and west of Magnolia Street between Ross Avenue and Ford Street; east of Lamar Street and west of the north and south alley between Magnolia Street and Griffin Street between Ford Street and Caruth Street; and east of Carter Street and west of Orange Street between Caruth Street and McKinney Avenue, all of said real estate for said tracks and their location being shown upon a blue print map attached hereto, marked Exhibit "A," identified by the signature of the parties hereto and made a part hereof.

(*b*) Said real estate shall be conveyed to aforesaid Trustee by vesting therein a good and marketable title and on indefensible estate in fee, with the right to the use thereof for any and all railway purposes. Said conveyances may provide that the title to said real estate shall revert to the party, or parties conveying title thereto to said trustee in the event said real estate so conveyed is hereafter abandoned for railway purposes or for any use in connection therewith or incident thereto.

(*c*) When the Receiver and the Railway shall remove the tracks from Pacific Avenue not required for the operation of certain passenger trains of the Gulf, Colorado & Santa Fe Railway Company and in serving the Fulton Bag and Cotton Mills as in Section 1 of Article II hereof provided, said Trustee shall forthwith convey all of said real estate described in Section 1 of Article I hereof, to the Receiver of the Railway, as the Receiver may direct, by vesting therein the same character of title as required to be vested in said Trustee by Section 1 of this Article I, free from liens or claims for taxes.

Section 2. That in consideration of One Hundred Thousand Dollars ($100,000) to it paid by the City of Dallas it will forthwith upon receipt of the title thereto sell and convey to the City, by deed similar to that by which it receives such title, all of the real
44 estate conveyed to it by the Receiver and the Railway as in Section 2 of Article II hereof provided.

Section 3. That it will assume and bear, indemnify and save harmless the Receiver and the Railway, their successors and assigns, from any and all damages awarded by any Court of competent jurisdiction, due to, growing out of, or incident to the removal of tracks from Pacific Avenue or any part thereof, or the construction of tracks to serve the industrial district as in Section 1 hereof described, to an aggregate amount of Five Thousand Dollars (5,000) or in the event the Receiver or the Railway shall, with the consent of the Trackage Company, compromise or settle said claims for damages it will assume and bear the amount thereof to the extent of the same aggregate sum.

Article II.

For and in consideration for the faithful keeping of the covenants of the other parties hereto the Receiver and the Railway hereby covenant and agree as follows:

Section 1. (*a*) That they did on the — day of ——, 1918, enter into an agreement with Houston & Texas Central Railroad Company by the terms of which said Houston & Texas Central Railroad Company is required to promptly begin the construction, and within one year to complete, a line of railway extending from a connection with the tracks of the Union Terminal Company near Santa Fe Junction in South Dallas to a connection with the main track of The Texas & Pacific Railway Company near its crossing of White Rock Creek east of the City of Dallas, and to permit the use thereof by the trains of the Receiver and the Railway.

(*b*) Forthwith upon the completion of said line of railway to be constructed by the Houston & Texas Central Railroad Company, (which the Receiver and the Railway shall use all legal means to compel), and when the Trackage Company has put the aforesaid Trustee in peaceful possession of all of the real estate to be
45 conveyed as in Section 1 of Article I hereof provided, and the City has duly granted unto the Receiver or the Railway, their successors or assigns, all of the ordinances as in Article III hereof provided, the Receiver and the Railway, their successors or assigns, shall forthwith abandon the use of all of the tracks upon Pacific Avenue between Griffin Street and Preston Street, except that seventy-five feet of the spur track serving the Fulton Bag & Cotton Mills extending along the southern boundary of Pacific Avenue, which shall remain until January 1, 1923, and thereafter until its removal shall be directed by the City, whereupon it shall be removed by the Receiver or the Railway.

(*c*) Upon abandoning the use of said tracks as aforesaid the Receiver and the Railway shall forthwith remove all of them not required for the operation of certain passenger trains of Gulf, Colorado & Santa Fe Railway Company in the exercise of its rights to use the line of road of the Texas & Pacific Railway extending from its connection with the tracks of the Union Terminal Company near the intersection of Houston Street and Pacific Avenue in West Dallas to a connection with the tracks of the Gulf, Colorado & Santa Fe Railway Company in East Dallas, acquired under the terms of an agreement between the Railway and the Union Terminal Company et al., dated April 1, 1912, and approved by the City of Dallas by an ordinance passed December 1, 1912. Upon the expiration of said right by the Gulf, Colorado & Santa Fe Railway Company, or its relinquishment of said right by an agreement in writing with the Receiver or the Railway, their successors or assigns, all of said tracks shall be promptly removed by the Receiver or the Railway.

Section 2. That after the Receiver or the Railway have been put in peaceful possession of the real estate described in Section 1 of Article I hereof, and one of them is duly vested with title
46 thereto, they will abandon the use of all property lying between Griffin Street and Lamar Street south of a line drawn parallel to and forty feet south of the north line of Pacific Avenue if projected in a straight line west of Griffin Street, removing all tracks

therefrom, and will convey to the Trackage Company by special warranty deed so much thereof as the railway has title to, and will quit claim to the Trackage Company the remainder thereof. Said special warranty deed shall protect and save harmless the Trackage Company, its successors and assigns from all claims growing out of mortgages and liens of whatsoever kind now or hereafter existing upon said property in favor of persons whomsoever, against the Receiver or the Railway, but not otherwise or further.

Section 3. A connection between the tracks to be constructed, maintained and operated by the Receiver or the Railway between Griffin Street and Lamar Street north of said line drawn parallel to and forty feet south of said north line of Pacific Avenue is projected west of Griffin Street, shall be made across Griffin Street with said track or tracks required to be maintained on Pacific Avenue for use of trains of the Gulf, Colorado & Santa Fe Railway Company as aforesaid.

Section 4. That after receipt of title from said Trustee to all of the real estate to be conveyed by the Trackage Company, as in Section 1 of Article I hereof provided, and the City has granted the ordinances with respect thereto as in Article III hereof provided, the Receiver or the Railway will forthwith begin the construction of the tracks shown by red lines upon said Exhibit "A" hereto attached, to serve the industrial district described in Section 1 of Article I hereof, and will complete them as soon as may be thereafter by the exercise of due diligence. Due allowance shall be made for the delays encountered in completing said tracks on account of
47 inability to secure labor or materials, or for other causes beyond the control of the Receiver or the Railway. If labor and material can be obtained at prices not more than those being paid by the Receiver or the Railway for similar labor and material and their construction is not prevented or delayed, said tracks shall be completed within one year after the Receiver or the Railway is placed in peaceful possession of all of said real estate.

Section 5. That the Receiver or the Railway, their successors or assigns shall upon completion thereof maintain and operate said tracks during the term of the ordinances of the City relating thereto.

Article III.

For and in consideration hereof and in order that the parties hereto may carry out the plans outlined herein, the City hereby covenants and agrees as follows:

Section 1. That it will by proper and valid ordinance, subject to usual conditions and to the controlling laws and charter of the City, grant unto the receiver or the Railway, or both, their successors or assigns, the right during the full term of twenty (20) years ensuing from the date of the passage of said ordinance, to from time to time, and at any time, construct, maintain and operate tracks shown by red lines upon a blue print map attached hereto, marked Exhibit

'B,' identified by the signatures of the parties hereto and made a part hereof, including the right to construct, maintain, and operate said tracks shown across all streets, alleys and public places at grade.

Section 2. That it will likewise grant unto the Receiver or the Railway, or both, their successors or assigns, the right to operate their trains, locomotives and cars over the tracks of Houston & Texas Central Railroad Company to be constructed as described in
48 section 1 of Article II hereof provided, and across all streets, alleys and public places crossed by said tracks within the City of Dallas.

Section 3. That it will by proper and valid ordinances abandon for street purposes and convey to the Receiver or the Railway as directed by the Receiver, all of its right, title or interest in the real estate lying between Griffin Street and Lamar Street north of a line drawn parallel to and forty feet south of the north line of Pacific Avenue if projected in a straight line westward of Griffin Street, to be used by the Receiver or the Railway for the construction, maintenance and operation of railroad tracks, or for other railway purposes.

Section 4. That it will pay to the Trackage Company One Hundred Thousand Dollars ($100,000.) in consideration for the real estate to be conveyed to it by the Trackage Company as in Section 2 of Article I hereof provided, and to use all of the said real estate in opening and extending Pacific Avenue between Griffin Street and Lamar Street.

Article IV.

For and in consideration of their mutual covenants the parties hereto mutually agree as follows:

Section 1. (*a*) That in the event the Trackage Company shall be unable, except at extraordinary expense, to procure and convey to said Trustee character of titles provided in paragraph "*b*" of Section 1 of Article I hereof to certain portion of the real estate described in paragraph "*a*" of Section 1 of Article I hereof, then and in that event, the Railway and Receiver shall accept an easement title to said portions, approved by the attorneys for the Receiver or the Railway, and be of a character that will give to the Receiver or the Railway full and free possession of said real estate with the right to hold and use the same without hinderance or interference for the construction, maintenance and operation of tracks thereon,
49 or for any and all railway purposes, or for use in connection therewith or incident thereto.

Section 2. That the agreement of the Receiver and the Railway to abandon the use of, or remove the said tracks, or any part thereof, as in Article II hereof provided, shall not be binding in the event they or either of them shall be prevented or restrained from so doing by decree of any Court of competent jurisdiction in suit or suits insti-

tuted with respect thereto by parties other than the Receiver or the Railway. The Receiver or the Railway shall not be deemed as in any way breaching this agreement in the event any Court of competent jurisdiction shall require said tracks or any part thereof to be replaced, maintained and operated after having been abandoned or removed as in Article II hereof provided, nor shall they be held for damages by the other parties hereto on account of such happening.

Section 3. That in the event the City shall at any time within the full period of twenty (20) years from the date of the ordinances to be passed as in Article III hereof provided, fail, or refuse to permit the full and free exercise of the rights thereby granted to the Receiver or the Railway, their successors or assigns, the said Receiver or the Railway, their successors or assigns shall have the right to re-enter upon Pacific Avenue and at the expense of the City restore the tracks thereon between Lamar Street and Preston Street in the same position as they are on the date hereof, and they shall have the right to thereafter maintain and operate them as though this agreement had not been written.

Section 4. (*a*) That in the event the Trackage Company shall be unable to procure and convey to the said Trustee the real estate as in Section 1 of Article I hereof provided, on or before the completion of line or railroad to be constructed by Houston & Texas Central Railroad Company as provided in Section 1 Article II hereof, but within twenty four (24) months thereafter shall so do, the Receiver and the Railway will thereupon do and perform all of the things of them required as in Article II hereof provided.

(*b*) That in the event the Receiver or the Railway shall be enjoined from removing the tracks from Pacific Avenue, or abandoning the use thereof, as in Section 1 of Article II hereof provided, the Receiver and the Railway shall resist such action, in good faith, and to the court of last resort, and said Trustee shall continue to hold in trust the title to the lands described in Section 1 of Article I hereof so long as the Receiver or the Railway shall in good faith contest such action to the Court of last resort. If said Court shall sustain and make permanent such injunction then and in that event said Trustee shall convey to said Trackage Company title to said lands.

(*c*) That in the event the Receiver or the Railway shall be enjoined or restrained from removing or abandoning any part of the tracks herein required to be by them removed or abandoned, then and in that event neither the Receiver nor the Railway shall be required to remove or abandon any portion of the remainder of said tracks required herein to be by them removed or abandoned until the said injunction or restraint shall have been dissolved.

(*d*) That in the event the Receiver or the Railway shall be enjoined or restrained from removing to abandoning any part of the

tracks herein required to be by them removed or abandoned and such injunction or restraint shall be sustained and made permanent by the Court of last resort, then and in that event neither the Receiver nor the Railway shall be required to remove or abandon any other part of the tracks herein otherwise required to be by them removed or abandoned, and the Receiver and the Railway shall have the right to restore any and every part of said tracks which may have been removed prior to such action by said Court of last resort, and to maintain and operate all of said tracks as though this agreement had not been written.

Article V.

The making of this agreement by the Receiver and the Railway is conditioned upon approval thereof by the Government of the United States acting through the Director General of Railroads, or his authorized representative, and by the United States District Court for the Western District of Louisiana, and by the Board of Directors of the Railway.

When so approved this agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns.

In witness whereof the parties hereto have signed and executed the above — foregoing contract, the corporations signing through their duly authorized officers and the Receiver signing individually after being duly authorized by Court.

Executed in four counterparts.

WHOLESALE DISTRICT TRACKAGE COMPANY,

By —— ——.

Attest:

—— ——,

Secretary.

THE TEXAS & PACIFIC RAILWAY COMPANY,

By —— ——, *Its President.*

Attest:

—— ——,

Secretary.

—— ——,

Receiver the Texas & Pacific Railway Company.

Attest:

—— ——.

THE CITY OF DALLAS,

By —— ——, *Its Mayor.*

Attest:

—— ——,

Secretary.

52 *Answer of Wholesale District Trackage Co.*

Filed January 18, 1919.

Answer of Wholesale District Trackage Company, Hereinafter Called Defendant, to the Petition of Plaintiffs.

Now comes the Wholesale District Trackage Company in answer to petition of plaintiffs filed herein on the — day of December, 1918, and say-:

1.

Defendant is without knowledge as to the fact alleged in paragraph 1 of plaintiffs' petition, and demands strict proof thereof.

2.

Defendant is without knowledge as to the fact alleged in paragraph 2 of plaintiffs' petition, and demands strict proof thereof.

3.

Defendant admits the facts alleged in paragraph 3 of plaintiffs' petition.

4.

Defendant admits the facts alleged in paragraph 4 of plaintiffs' petition.

5.

53 Defendant admits the fact alleged in paragraph 5 of plaintiffs' petition.

6.

Defendant admits the fact alleged in paragraph 6 of plaintiffs' petition.

7.

Replying to the allegations of paragraph 7 of plaintiffs' petition, defendant denies that this is a suit cognizable in equity, and alleges that, if the plaintiffs have any of the rights asserted by them, that they have a full and adequate legal remedy to enforce such rights and should be remitted to their legal remedy.

Defendant further denies that the plaintiffs have or will suffer any loss or damage by reason of the contemplated removal of the railroad tracks from a segment of Pacific Avenue.

Defendant further denies that the plaintiffs have any rights, priv-

ileges or immunities which are protected by any provision of the Constitution of the United States.

8.

Defendant admits that the Texas & Pacific Railway Company, prior to the time of the appointment of Receivers, operated a line of railway extending from the City of New Orleans to the State line of Texas and Louisiana, and from said State line East and West through the State of Texas, traversing the city and county of Dallas, in the State of Texas.

Defendant admits that said Railway Company, in about 1872 built and operated a line of railway on what is now known as Pacific Avenue, but alleges that said railway was constructed upon said Avenue for a distance of more than two miles East and West.

Defendant admits that in 1872 the city of Dallas was a village, but is without knowledge as to whether or not the appropriation and use of said street by said Railway Company was then, there and
54 ever thereafter, in all respects, lawful, and demands strict proof as to such allegation.

Defendant admits that the village of Dallas grew into a town and the town into the existing City.

Defendant denies that the industrial enterprises located upon Pacific Avenue require the switch tracks and switching facilities now operated by the Texas & Pacific Railway Company.

Defendant is without knowledge as to when the single line track of said Railway Company was changed to a double-line track, and is without knowledge as to the necessity occasioning such change and demands strict proof of plaintiffs' allegations with reference thereto.

Defendant is without knowledge as to the substance of petition presented by said Railway Company to the City of Dallas for a franchise for double tracks upon Pacific Avenue, and is without knowledge as to the cause inducing the presentation of such petition, and neither admits or denies plaintiffs' allegations with reference thereto, but demands strict proof thereof.

Defendant is without knowledge as to the inducements which the said Railway Company offered to the City of Dallas for a franchise for a double track on Pacific Avenue, and demands strict proof of plaintiffs' allegations with reference thereto.

Defendant is without knowledge as to the franchise granted Texas & Pacific Railway Company for double track upon Pacific Avenue by its co-defendant, the City of Dallas, except that this defendant is advised that the City of Dallas granted the said Railway Company some character of franchise upon said Avenue.

Defendant is without knowledge as to the terms and requirements of the franchise granted by the City of Dallas to the Texas & Pacific Railway Company, and is without knowledge as to the
55 validity of said grant, and demands strict proof of plaintiffs' allegations with reference thereto.

Defendant is without knowledge as to the allegation in plaintiffs' petition to the effect that the Texas & Pacific Railway Company acad-

amized the portion of Pacific Avenue occupied by its double tracks, and between said tracks, and up to the end of the ties, and demands strict proof thereof.

Defendant is without knowledge as to the allegation that the franchise of the Texas & Pacific Railway u*op*n Pacific Avenue is a valid, subsisting contract by and between said Railway Company and the City of Dallas, but denies that such contract, if any such exists, is irrevocable or uncontrollable.

Defendant alleges that the City of Dallas, in the proper exercise of its police power, and in the proper exercise of the power reserved to it by the Constitution of the State of Texas, has the right to compel the removal of the Texas & Pacific Railway tracks between Lamar Street and Preston Street in said City.

Except as hereinabove alleged, the defendant specifically denies all the allegations of fact contained in paragraph 8 of plaintiffs' petition.

8-A.

It appears that plaintiffs' petition contains two paragraphs numbered 8. Replying to the second paragraph bearing such LUMBER, defendant is without knowledge as to the facts alleged in said paragraph, with this exception: That defendant admits that plaintiffs purchased the property described in said paragraph and constructed thereon a building for the purpose of conducting its business in the City of Dallas.

9.

Defendant is without knowledge as to the facts alleged in paragraph 9 of plaintiffs' petition and demands strict proof thereof.

10.

Defendant is without knowledge as to the facts alleged in
56 paragraph 10 of plaintiffs' petition.

11.

Defendant admits that on or about July 30, 1912, the City passed a franchise ordinance in favor of Texas & Pacific Railway Company, but is without knowledge as to the terms of said ordinance, but believes that plaintiffs have attached to their petition an exact copy thereof, and asks that said ordinance be construed and its legal effect determined.

Defendant denies that the chief and moving consideration for the passage of said franchise ordinance em*i*nated from the plaintiffs.

Defendant denies that said ordinance constitutes a valid and subsisting tripartite agreement by, between and among the plaintiffs, the City of Dallas and the Texas & Pacific Railway Company.

Defendant prays that the terms of said franchise ordinance be con-

sidered, and that its legal effect be ascertained and determined by this Honorable Court.

Defendant is without knowledge as to plaintiffs' allegation that it executed and delivered to the City a valid deed of dedication, whereby it forever dedicated to the public use for street purposes 99 square feet of land, and neither admits or denies such allegation, but demands strict proof thereof.

Defendant is without knowledge as to whether the public accepted and acted upon the dedication by plaintiff of 99 square feet of land described in paragraph 11 of plaintiffs' petition, and neither admits or denies such allegation, but demands strict proof thereof.

Defendant is without knowledge as to plaintiffs' allegation that the defendant Railway Company accepted in writing franchise grant described in plaintiffs' petition, and is without knowledge as
57 to plaintiffs' allegation that plaintiff and said Railway Company had in all things in good faith fully complied with said franchise grant and its requirements, and defendant neither admits nor denies such allegation, but demands strict proof thereof.

Defendant denies that said franchise grant is a valid and subsisting, irrevocable agreement between the plaintiff, the defendant Railway Company and the City of Dallas, and asks that said franchise grant be considered and construed by the Court.

Defendant denies plaintiffs' allegation that the City of Dallas did not reserve and does not possess the right to annul or repeal the franchise grant described in plaintiffs' petition, and asks that such franchise grant be considered and construed by the Court.

Defendant denies plaintiffs' allegation that the defendant Railway Company has not been required to abandon its track on Pacific Avenue, and alleges the fact to be that said Railway Company, in its contemplated abandonment of a section of its track upon Pacific Avenue, is acting in obedience to the lawful request and demand of the City of Dallas.

Defendant is without knowledge as to plaintiffs' allegation to the effect that if the defendant Railway Company should be required to elevate or depress its tracks on Pacific Avenue, the switch or spur track serving its plant may likewise be elevated or depressed, and thereby be made to continue to serve the plant. It neither admits nor denies said allegation, but demands strict proof thereof.

As to other allegations in paragraph 11 these respondents deny same and call for strict proof.

12.

Replying to the allegations in paragraph 12 of plaintiffs' petition, defendant denies that the laws of the State of Texas, either Statutory or common, prohibit the removal or re-location of a railway company's main line tracks. Even though such law was in ex-
58 istence in the State of Texas, same would not apply to the Texas & Pacific Railway Company. The defendant Railway Company is, however, subject to the reasonable exercise of

police regulations in the State of Texas and the city of Dallas in the operation of its property. The City of Dallas, a municipal corporation, exists under a special Charter which gives to the City of Dallas, through its duly authorized officers or representatives the right to regulate the use of the streets and alleys of said City, and to enforce and carry out reasonable police regulations to that end.

Defendant denies that the Texas & Pacific Railway Company contemplates abandoning the right to operate its line of railroad through the city of Dallas, and alleges the fact to be that the defendant Railway Company expects to continue to operate its railway in and through the City of Dallas. The defendant Railway Company, however, contemplates a re-location of a small segment of its track located upon Pacific Avenue. Such re-location is imperatively required and demanded by the public interests, and is contemplated to be made in behalf of the public interest and welfare.

13.

Defendant is without knowledge as to the facts alleged in paragraph 13 of plaintiffs' petition, with this exception: The defendant admits that the plaintiffs constructed a building of substantial design and architecture upon the lot described in plaintiffs' petition.

14.

Defendant is without knowledge as to the facts alleged in paragraph 14 of plaintiffs' petition and neither admits or denies the same, but demands strict proof thereof, with this exception: Defendant admits that the Texas & Pacific Railway Company constructed a switch which serves the plant of plaintiffs, and that it contemplates the removal of such switch track from Pacific Avenue.

15.

59 Defendant is without knowledge as to the facts alleged in paragraph 15 of plaintiffs' petition, and neither admits nor denies them, but demands strict proof thereof.

16.

Defendant is without knowledge as to the facts alleged in paragraph 16 of plaintiffs' petition, and neither admits nor denies such facts, but demands strict proof thereof.

17.

Defendant denies the facts alleged in paragraph 17 of plaintiffs' petition.

18.

Defendant is without knowledge as to the facts alleged in paragraph 18 of plaintiffs' petition and neither admits nor denies such facts, but demands strict proof thereof.

19.

Defendant admits that it is contemplated that the Texas & Pacific Railway Company will remove its track from Lamar Street to Central Avenue, a distance of about 4,380 feet, but denies that such removal is to be voluntarily made, and alleges that such removal is made in obedience to the lawful request and demand of the city of Dallas, and in obedience to the demands of the public interest and welfare.

Defendant denies that the defendants entered into any unlawful or selfish conspiracy, but alleges the fact to be that in everything contemplated to be done, they are acting in behalf of the public interests.

Defendant is without knowledge as to whether or not the defendant Railway Company has entered into a contract with the Houston & Texas Central Railway Company, as alleged by plaintiffs, and is without knowledge as to the terms, conditions or stipulations of any such contract, and neither admits nor denies plaintiffs' allegation with reference thereto, but demands strict proof thereof.

As to other allegations contained in paragraph 19 of plaintiffs' petition, defendant specifically denies same.

20.

60 Defendant is without knowledge as to the facts alleged in paragraph 20 of plaintiffs' petition and neither admits nor denies such facts, and demands strict proof thereof.

21.

Defendant denies the facts alleged in paragraph 21 of plaintiffs' petition, with this exception and qualification: That defendant admits the Board of Commissioners passed the resolution described in said paragraph and approved by the Mayor on August 23, 1918, and admits that the City of Dallas executed a contract in pursuance of such resolution, but denies that the defendant Railway Company has approved or executed said contract. Defendant is without knowledge as to whether or not said Railway Company will approve and execute such contract. Defendant believes that the copy of the contract marked Exhibit "D" and attached to plaintiffs' petition is a true copy of the contract which has been signed by the City of Dallas.

22.

Replying to plaintiffs' allegation as to the terms of the contemplated contract between the City and the defendant Company, defendant says that said contract is attached to and made a part of plaintiffs' petition and is marked Exhibit "D" for identification, and defendant requests that said contract be considered and construed by the Court.

Defendant denies that the sum contemplated to be paid by the City of Dallas to the Wholesale District Trackage Company was to be paid as an inducement to the Texas & Pacific Railway Company and the Wholesale District Trackage Company, to impair and destroy the vested contractual rights of plaintiffs, and allege the fact to be that said money is to be paid for value received and for lawful purpose.

Defendant is without knowledge as to plaintiffs' allegation that no appropriation had been made by the City of Dallas, out of
61 which the defendant was to pay the Wholesale District Trackage Company for certain land, the property of said Company. Defendant neither admits nor denies said allegation, but demands strict proof thereof.

23.

Defendant admits that the plant of the Fulton Bag & Cotton Mills is located upon Pacific Avenue immediately west of Preston Street in the City of Dallas. That Preston Street is one of the main and principal thoroughfares of the City of Dallas which crosses Pacific Avenue. That a double track electric street railroad is being operated upon Preston Street. That there now exists a side-track, making off of the main line of the defendant Railway Company on Pacific Avenue, which serves the plant of the said Fulton Bag & Cotton Mills. That in the contract marked Exhibit "D" and attached to plaintiffs' petition, which has been signed by the City of Dallas, it is provided that said side track and switch serving the said plant of Fulton Bag & Cotton Mills, shall remain undisturbed for a period of five years.

Defendant denies that such contemplated agreement would operate as a discrimination against the rights of plaintiffs, and denies that plaintiffs have any interest in reference thereto, and denies that it is entirely practicable for the said side track to be so extended as to serve the plant of these plaintiffs without public or other detriment, but alleges the fact to be that if said side track were extended to serve the plant of the plaintiffs, that such extension would result in serious and permanent public detriment.

Defendant specifically denies all facts alleged by plaintiffs in paragraph 23 of its petition not hereinabove specifically admitted.

24.

Defendant denies the facts alleged in paragraph 24 of plain-
62 tiffs' petition with this exception: That, in so far as said paragraph attempts to state the terms of the contract marked Exhibit "D," and made a part of plaintiffs' petition, the defendant

requests the Court to consider said alleged contract and construe its terms.

25.

Defendant denies the facts alleged in paragraph 25 of plaintiffs' petition, except in so far as same relates to the terms of the alleged contract marked Exhibit "D" and made a part of plaintiffs' petition, and replying thereto, defendant requests the Court to consider said alleged contract and construe its terms.

26.

Replying to the facts alleged in paragraph 26 of plaintiffs' petition, defendant requests the Court to consider and construe the terms of the alleged contract marked Exhibit "D" and made a part of plaintiffs' petition.

27.

Defendant denies the facts alleged in paragraph 27 of plaintiffs' petition.

28.

Defendant admits that the defendant Railway Company made application to the Railroad Commission of the State of Texas for authority to move its tracks from a designated portion of Pacific Avenue and thereafter, to-wit, on March 15, 1918, the said Railroad Commission of Texas granted and passed an order authorizing and permitting the defendant Railway Company and J. L. Lancaster and Pearl Wight, receivers thereof, to abandon and remove the railroad tracks now located upon Pacific Avenue in the city of Dallas, Texas, between Preston Street and Griffin Street, and the defendant further admits that the City of Dallas, through one of its Commissioners and property owners upon Pacific Avenue, interested in such track removal, co-operated with the defendant Railway Company in securing such order from the Railroad Commission of Texas.

63 Defendant denies that said order of the Railroad Commission was granted and passed without any notice to plaintiffs, and denies that neither of the plaintiffs appeared therein, but alleges the fact to be that plaintiffs did have notice of the application made by the defendant Railway Company, and did appear and defend against the order of the Railroad Commission authorizing the removal of tracks from a portion of Pacific Avenue.

Defendant denies all other facts alleged by plaintiffs in paragraph 28 of their petition.

29.

Replying to the allegations in paragraph 29 of plaintiffs' petition with reference to the act of the Legislature of the State of Texas, approved March 22, 1918, and which became a law on June 27, 1918,

the defendant respectfully asks this Honorable Court to consider and construe such act.

30.

Defendant denies the facts alleged in paragraph 30 of plaintiffs' petition.

31.

Defendant denies the facts alleged in paragraph 31 of plaintiffs' petition.

32.

Answering further herein, defendant says that any contract or agreement contemplated to be made by and between the defendants herein, or any of them, regarding the removal of tracks from a portion of Pacific Avenue, has been prompted by good faith upon the part of the defendants, and it is not contemplated that the Texas & Pacific Railway Company shall abandon the right to operate its trains into and through the city of Dallas, but it is contemplated that the tracks of the defendant Railway Company, in event they are removed from a portion of Pacific Avenue, shall be located at some other point in the City of Dallas, to protect the safety of
64 the general public in the city of Dallas. This defendant says that as yet no agreement has been entered into or finally closed between the defendants concerning the removal of the defendant Railway Company's tracks between Lamar and Preston Streets, but that such a contract is in contemplation, but that said contract does not contemplate that the defendant Railway Company shall abandon any of its franchises, privileges or rights to maintain and operate its tracks in or through the city of Dallas, but merely has in contemplation the carrying out of reasonable police regulation by the City of Dallas, in changing the present location of the main line tracks of the defendant Railway Company between certain points on Pacific Avenue. That the proposed contract contemplates that the defendant Railway Company and its Receiver shall be furnished easements along, over and through other portions of the City of Dallas, and through, along and over other streets in the City of Dallas, under the terms of franchises to be granted the said Railway Company and the Receiver of said Company.

That the main line of the road of the defendant Railway Company runs through the City of Dallas, Texas, from the Eastern to the Western boundary of said City, and that both the business center and the residence center of the City of Dallas is situated on the North and South side of said main line. That the main line of the defendant Railway Company on Pacific Avenue is crossed by many streets leading North and South and the traffic on and over such cross streets is great, both as to use by pedestrians and vehicles. That all of said streets cross the main line of said Railway at grade, and that the traffic upon Pacific Avenue and over and across said Avenue between

Lamar and Preston Streets in the City of Dallas, is exceedingly heavy.

Defendant alleges that the public interests imperatively require and demand a removal of the defendant Railway Company's tracks between Lamar and Preston Streets in the city of Dallas, and
65 that the contemplated removal of said tracks between said streets is solely in behalf of the public interest and welfare.

Your respondents therefore ask that the petition of plaintiffs be dismissed as being without equity.

WHOLESALE DISTRICT TRACKAGE COMPANY,
By W. R. HARRIS,
Counsel.

66 *Answer of Texas & Pacific Ry. Co. and Pearl Wight, Receiver.*

Filed February 3, 1919.

Joint and Several Answer of the Defendant The Texas & Pacific Railway Company and Pearl Wight, Receiver of The Texas & Pacific Railway Co.

Now comes The Texas & Pacific Railway Company, and Pearl Wight, Receiver of The Texas & Pacific Railway Company, defendants named in the above styled cause, and for answer thereto say:

That this Court is without jurisdiction as against these defendants to hear and determine the issues involved and that no cause of action is stated against these defendants for the following reasons:

I.

First. It appears from complainants' bill herein that this Court is without jurisdiction to entertain this cause.

Second. The allegations of complainants' bill herein fail to allege a state of facts or any conclusions of law that give to this Court any jurisdiction to entertain any cause of action as against these defendants.

Third. Because it appears from complainants' bill herein that this suit is not one between citizens of different states. It appears from the bill herein that one of the complainants herein is a resi-
67 dent and citizen of the State of Texas, to wit: Armour & Company of Texas. Another complainant is a resident and citizen of the State of New Jersey. Two of the defendants, The City of Dallas, and the Wholesale District Trackage Company, as appears from complainants' bill, are both citizens and residents of the State of Texas. That, The Texas & Pacific Railway Company, one of the defendants is a corporation incorporated under and by virtue of an Act

of Congress of the United States, and that Pearl Wight, Receiver, is a citizen of the State of Louisiana.

Fourth. Because it appears from complainants' bill that this is not a civil suit or controversy arising under the Constitution of the United States or any law of the United States.

Fifth. Because it appears from complainants' bill that if complainants have any cause of action, said cause of action is one at law and not in equity.

For further answer, if so required, they say:

II.

They admit the allegations of paragraphs 1, 2, 3, 4, 5 and 6 of complainants' bill to be substantially true as alleged, except so much as states that John L. Lancaster is President of The Texas & Pacific Railway Company. These defendants deny that the said John L. Lancaster is now President of The Texas & Pacific Railway Company, nor was he President of the said The Texas & Pacific Railway Company at the time this suit was filed.

III.

These defendants expressly deny the allegations in toto of paragraph 7 of complainants' bill.

IV.

They admit as substantially true the allegations of fact as set forth in paragraph 8 of the bill of complaint.

68

V.

As to paragraph 9 of complainants bill, these defendants say:

First. As to whether or not Armour & Company of New Jersey are legally authorized to do business in the State of Texas, these defendants are not advised, but call for strict proof of same.

Second. As to whether or not the complainants' purchased the property described in said paragraph 9, these defendants are not advised and call for strict proof of same, the deed of conveyance being the best evidence of the terms and conditions of same.

These defendants state, however, that, whatever agreement that may have been made between Armour & Company and the City of Dallas, or between Armour & Company and any other person, concerning the purchase of said land, was made alone between the parties to said agreement and not with The Texas & Pacific Railway Company or with the Receiver of The Texas & Pacific Railway Company or with anyone having any authority to bind or obligate The

Texas & Pacific Railway Company or the Receiver of The Texas & Pacific Railway Company.

These defendants expressly deny that they or either of them had any interest in the contract covering the purchase of the land described in said paragraph 9, and they expressly deny that J. W. Everman or anyone else representing The Texas & Pacific Railway Company ever entered into any written agreement with the said Armour & Company, or any representative of the said Armour & Company, for the construction and maintenance of said switch connection. That, the only arrangement or agreement that was ever made by the said The Texas & Pacific Railway Company concerning said switch connection was an agreement that if the City of Dallas would grant The Texas & Pacific Railway Company
69 a franchise or right to construct said industry track The Texas & Pacific Railway Company would construct same, and that any action taken by J. W. Everman in the matter was taken with this understanding and with the further understanding that if said industry track was to be maintained for the benefit of said Armour & Company they would execute the ordinary standard form of industry track contract required by The Texas & Pacific Railway Company from all parties for whom industry tracks were constructed; that the said Armour & Company refused to execute a written agreement with The Texas & Pacific Railway Company for the construction and maintenance of this track and said track was put in by The Texas & Pacific Railway Company for its own use and as its own track to the said Armour plant.

These defendants expressly deny any and all other allegations contained in said paragraph 9 and call for strict proof of same, and further state that the best evidence of the facts therein alleged is the ordinance granted by the City of Dallas giving to The Texas & Pacific Railway Company the franchise or right to construct said industry track to the Armour plant.

These defendants state, however, that whatever rights were obtained by Armour & Company under and by virtue of said ordinance for the construction of said industry track to their plant said rights were accepted by them with the full understanding that the City of Dallas had the right to cancel and abrogate said ordinance at any time it might see proper in the event it should conclude to require The Texas & Pacific Railway Company to remove its tracks from Pacific Avenue, or lower or raise its grade on Pacific Avenue.

70 VI.

As to paragraph 10 of said bill of complaint, these defendants say that at the time said Armour & Company constructed their building or plant on Pacific Avenue which was served by said industry track in controversy, that said Armour & Company knew full well that it was subject to the right of the City at any and all times to cancel said ordinance granting the franchise to construct said industry track, and they constructed their building or plant with full knowledge of the fact that same was subject at all times to the exer-

cise of reasonable police regulations by the City of Dallas in the matter, not only as to said industry track, but as to the main line of The Texas & Pacific Railway Company from which said industry track radiated. That said Armour & Company have maintained their plant for a period of about seven years, and neither this defendant nor the City of Dallas are acting in bad faith with the said Armour & Company in removing said industry track at this time as said Armour & Company were fully advised that both the City of Dallas and these defendants had a perfect right to remove said track at any time that they might desire, and said plant and said building of Armour & Company was constructed with full knowledge of the existence of these facts.

VII.

As to paragraph 11 of said bill of complaint, these defendants state that they are not advised as to the beliefs, assurances, representations, and agreements that may have affected Armour & Company in the matter of obtaining the ordinance from the City of Dallas, but they admit that petition was presented to the City of Dallas for a franchise for the construction, maintenance and
71 operation of the industry or spur track to serve the plant of said Armour & Company which was erected adjacent to the main line of said defendants on Pacific Avenue and that an ordinance was granted upon this application. That the terms and conditions of said ordinance are the best evidence as to its meaning, force and effect.

VIII.

As to paragraph 12 of said bill of complaint, these defendants admit that on July 10, 1912, the City of Dallas, being fully authorized, approved that certain valid and subsisting ordinance, a copy of which, marked "Exhibit C," is attached to complainants' bill. As to the consideration, they deny that in so far as these defendants are concerned that said ordinance constituted any agreement whatever between these defendants and Armour & Company, and these defendants state that said ordinance speaks for itself and is the best evidence of its terms, conditions and considerations.

They admit that section four of said ordinance reads as set forth in said petition.

As to the purpose of the alleged dedication of certain property for street purposes by said Armour & Company, these defendants call for strict proof of these allegations.

As to any and all allegations in said paragraph 12 as to the terms and conditions of said ordinance, these defendants state that said ordinance is the best evidence of its terms and conditions and these defendants call for strict proof of same.

These defendants admit that The Texas & Pacific Railway Company duly accepted said ordinance in its terms and conditions as written; that they have fully complied with all the terms and conditions of said ordinance. They deny that said ordinance, however, constitutes a subsisting, irrevocable agreement between the

complainants herein. The Texas & Pacific Railway Company
72 and the City of Dallas. On the contrary, these defendants say that this ordinance expressly provides that same may be revoked by the City of Dallas upon the happening of certain conditions, and these defendants expressly deny that the complainants herein acquired any vested right, by virtue of the terms and conditions of this ordinance, that could not be changed, amended, repealed or taken away under and by virtue of the terms of said ordinance, upon the happening of certain conditions.

As to whether or not complainants acquired any vested right, the protection whereof is guaranteed under the 14th Amendment to the Constitution of the United States, or the 5th Amendment to the Constitution of the United States, or Section 10, Article 1, of the Constitution of the United States, these defendants are not advised, and call for strict proof of same.

These defendants expressly state, however, that said City of Dallas did reserve the right to annul or repeal said ordinance and that the complainants herein accepted same with full knowledge of the fact that the said City of Dallas had expressly retained this right with the express purpose of exercising it at some future date; that, without reservation of the right to annul or repeal said ordinance as therein set forth same would not have been granted by the City of Dallas.

These defendants state that, in the exercise of a just and reasonable police regulation, demand has been made upon them by the City of Dallas to abandon their tracks between certain points on Pacific Avenue; that, although the City of Dallas has not the authority to require these defendants to remove their tracks from the City of Dallas and to abandon their franchise over Pacific Avenue in the City of Dallas, said City of Dallas, in the exercise of its police
73 powers had full authority to make regulations necessitating changes in said track, either in lowering the grade or raising the grade, or shifting the tracks from one point in the City to another point in the City, and, although said City of Dallas had no right to deprive these defendants of the franchise possessed by them on Pacific Avenue, said City of Dallas did have the right to compel these defendants to lower or raise the grade of their tracks or to shift same from one part of the street to the other, and had full right and authority to require the abandonment of the industry track of the Armour plant, as said industry track was put in under an ordinance and said franchise was granted to the defendants, The Texas & Pacific Railway Company, to construct same under and by virtue of the terms of an ordinance which gave the City express authority to have same removed at any time that the City desired should it conclude to exercise its police powers in the matter of requiring The Texas & Pacific Railway Company to change, lower or raise its grade on Pacific Avenue.

IX.

As to paragraph 13 of complainants' bill, these defendants admit the existence of the laws set forth therein, but state that said laws

have no bearing upon this case, and were not binding in any sense upon The Texas & Pacific Railway Company at the time it constructed its track or since. That, The Texas & Pacific Railway Company's line of road was constructed under and by virtue of an Act of Congress of the United States and not by virtue of any Texas Statute, and, further, said laws are of no force and effect in that
74 they carry no penalty for a breach of same, and, further, that said laws, if valid, would be subject at all times to the reasonable exercise of police regulations by the State, Counties and Munic-palities in the State of Texas.

X.

As to paragraph 14 of complainants' bill, these defendants are not advised as to the facts set forth therein, and call for strict proof of same.

XI.

As to paragraph 15 of complainants' bill, these defendants state that The Texas & Pacific Railway Company did, in pursuance of the authority granted to it by said ordinance, construct an industry or side track in accordance with said ordinance, and has operated its engines and cars over same ever since and is now operating same.

These defendants admit that negotiations are pending between these defendants and the City of Dallas relating to the abandonment and removal of said industry or side track, and it is true that they are making no offer to the complainants herein for compensation on account of same for the reason, first; that these defendants have a perfect right to agree with the City for the removal of said side or industry track, and the complainants herein have no cause of action as against either these defendants or the City of Dallas on account of the removal or abandonment of said industry or side track, as said complainants constructed their plant with full knowledge of the fact that the City of Dallas retained the express authority to cause said tracks to be removed or abandoned at any time it might see proper in the exercise of its police regulations.

75 XII.

As to paragraph 16 of complainants' bill, these defendants are not advised and call for strict proof of same.

They further state, however, that the City ordinance of July 10, 1912, granting the right to The Texas & Pacific Railway Company to construct said industry track did not provide for its assignment to any other person, nor did The Texas & Pacific Railway Company agree or obligate itself to construct, operate or use said industry track for the benefit of any assignee of Armour & Company of New Jersey, and these defendants deny that said Armour & Company of Texas acquired any interest, right or property in said track that would be binding either upon the City of Dallas or these defendants.

XIII.

As to paragraph 17 of complainants' bill, these defendants say they are not advised, and call for strict proof of same.

XIV.

As to the allegations contained in paragraph 18 of complainants' bill, these defendants deny same.

XV.

As to paragraph 19 of complainants' bill, these defendants are not advised and call for strict proof of same.

76 XVI.

As to paragraph 20 of complainants' bill, these defendants say that they deny any conspiracy or confederacy of any kind in connection with the removal of their tracks from Pacific Avenue. That, whatever arrangement they are making with the City of Dallas is for the purpose of carrying out certain reasonable police regulations desired by the City of Dallas. That the said Armour & Company of New Jersey and the said Armour & Company of Texas have no right in any wise to question the proposed agreement between these defendants and the City of Dallas, as the City of Dallas had full authority to cancel the franchise of The Texas & Pacific Railway Company for the operation and maintenance of the industry track to Armour's plant, said right being expressly retained in the ordinance under which said franchise was granted.

These defendants admit that, under the contemplated agreement between them and the City of Dallas, the tracks of The Texas & Pacific Railway Company will be removed from Pacific Avenue between Griffin Street and Lamar Street. These defendants would further state that the complainants herein have no interest as to the terms and conditions of the contract between these defendants and the City of Dallas nor have they any interest in the arrangement that will be made by these defendants with the Houston & Texas Central Railroad Company for handling their passenger trains through the City of Dallas. These defendants deny, however, the allegation in said paragraph 20 that the arrangement with the Houston & Texas Central Railroad Company and these defendants is nothing more than an operating agreement. They state the agreement is in writing and will be evidenced in the trial of this case. As to whether or not said operating agreement will require a detour of the trains of these defendants over a circuitous route is a
77 matter in which the complainants herein have no interest, but these defendants deny that the arrangement with the

Houston & Texas Central Railroad Company will materially increase the distance over which the trains of these defendants are to be moved.

XVII.

As to paragraph 21 of complainants' bill, these defendants expressly deny that Pearl Wight, as Receiver of The Texas & Pacific Railway Company, has not repudiated said agreement. As a matter of fact, said Pearl Wight, as Receiver, does not recognize the existence of any such agreement that necessitated a cancellation and if any such agreement did exist then the said Pearl Wight, as Receiver, has duly presented his application to the Court authorizing him to make and execute the contract with the City of Dallas complained of by the complainants herein, the effect of said application, (if any such contract did exist), being an application for authority to rescind. As a matter of fact, however, said Pearl Wight, as Receiver, has never recognized that the complainants herein had any rights in the form of an express contract that required notice of its cancellation.

Defendants admit that plaintiffs are large shippers and that said industry track was put in to serve their plant, with the right, however, upon the part of the City of Dallas to cancel this right if it saw proper.

As to the volume of business furnished by the complainants herein, these defendants are not advised, and call for strict proof of same if material.

These defendants admit that the business of complainants is valuable to them as is the business of any shipper that ships over their line, but that they give full value in the way of transportation services for all that they receive from the complainants herein.

As to whether or not the said Pearl Wight, Receiver, would
78 continue to operate said industry track but for the arrangement made with the City of Dallas would depend altogether upon the conditions surrounding its operation. Should the City of Dallas, however, require the raising or lowering of the grade of the main line tracks on Pacific Avenue, these defendants aver that said industry track would not be operated.

Said Pearl Wight, Receiver, expressly denies that he has in any wise estopped himself from questioning the validity of said alleged contract or cancelling same.

XVIII.

As to the allegations contained in paragraph 22 of complainants' bill, these defendants deny any confederation and conspiracy between them and the other defendants herein. They admit that they have agreed to execute the agreement between them and the other defendants marked Exhibit "D" and made a part of complainants' petition, and, further, that they had a perfect right to do so.

They deny any confederation or conspiracy between them and the other defendants herein to have the Board of Commissioners of the City of Dallas pass the resolution set forth in said bill; that said resolution was passed by the City of Dallas openly and above board with full knowledge to all parties in interest, and the said City of Dallas had full authority to pass said resolution and to carry out all of its terms and conditions.

These defendants admit that said Mayor and Secretary, acting in accordance with said resolution, did on August 23, 1918, execute contract, a copy of which, marked exhibit "A" is attached to complainants' bill. These defendants deny that said resolution, and said contract executed in pursuance thereof, are illegal and void, or that the passage of said resolution or the execution of said contract in pursuance thereof operated to deprive complainants of
79 their property without due process of law, or that said acts are violative of that part of the 14th Amendment of the Constitution of the United States, which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person without its jurisdiction the equal protection of the laws," and they expressly deny that such acts "impair and destroy the vested rights of plaintiffs existing under and by virtue of that certain ordinance of the City of Dallas, copy of which, marked Exhibit "C," is attached to plaintiffs' bill; and they deny that the passage of said resolution and execution of said contract is volative of that provision of clause 1 of section 10 of article I of the Constitution of the United States which provides "No state shall * * * pass any * * * law impairing the obligation of contracts."

They deny that said ordinance or resolution was adopted or that said contract was executed by the City of Dallas without any notice whatsoever or appearance by plaintiffs or any of them, or without opportunity being offered to either of them of being heard. On the contrary, plaintiffs had full knowledge of all of the proceedings and had a perfect right at all times to be heard if they so desired.

They deny any conspiracy between the defendants herein existed or was directed against any rights that Armour & Company might have. Said resolution and said acts and said contract was made for the purpose of enabling the City of Dallas to put into effect reasonable police regulations. Neither the City of Dallas nor these defendants ever recognized that Armour & Company of New Jersey or Armour & Company of Texas had any rights under the ordinance of July 10, 1912, that could not be taken away or cancelled by the City of Dallas upon the happening of certain conditions,
80 which conditions had, in effect, taken place. These defendants deny that the enactment and passage of said ordinance and resolution and execution of the contract, exhibit "D" to complainants' petition, operates to deprive plaintiffs of their property without due process of law or to impair the obligation of any alleged contract existing between plaintiffs herein and the defendants, and they expressly deny that any such acts are illegal, and to enjoin the

carrying out of said agreement would be a gross wrong to these defendants and an irreparable one which could not be cured or compensated in a moneyed judgment.

XIX.

As to the allegations of paragraph 13 of complainants' bill, these defendants admit that, among other things, the City of Dallas agrees to pay to its co-defendant, the Wholesale District Trackage Company, the sum of one hundred thousand dollars in consideration of certain real estate. As this agreement is in writing, these defendants call for the document itself as the best evidence of its terms and conditions. They deny that said payment is illegal and deny that the City of Dallas is acting beyond its powers and authority in making same, and they further deny that the Complainants herein have any right or interest in the matter that they can question in a suit of this character.

XX.

Defendants admit that the allegations contained in paragraph 24 of complainants' bill are substantially correct in the matter of the existence of the Fulton Bag & Cotton Mills on Preston Street and industry track serving said plant. They state, however, that this plant is not in competition in any wise with the plaintiffs herein, and they expressly deny that it is practical for said switch
81 or side track serving the plant of the Fulton Bag & Cotton Mills to be so extended so as to serve the plant of the complainants herein; that to do so would be detrimental to the public and would, in effect, destroy the exercise of the police powers of the City of Dallas in the matter of regulating the tracks on Pacific Avenue.

XXI.

These defendants deny the allegations of paragraph 25 of complainants' bill insofar as said allegations allege that said conveyance by the Wholesale District Trackage Company to the Railway Company would be illegal or would in any wise interfere with any rights of the complainants herein.

XXII.

As to paragraph 26 of complainants' bill, these defendants state that they will in good faith carry out the conditions of contract made Exhibit "D" to plaintiffs' bill; that they have every right to do so, complainants having no right to interfere with their doing so.

XXIII.

As to paragraph 27 of complainants' bill, these defendants state that said contract, Exhibit "D," is the best evidence of its terms and

conditions and these defendants aver that the City of Dallas has full authority and right to pass and approve the ordinance provided therein and that the said Armour & Company of New Jersey and Armour & Company of Texas have no interest in the matter whatsoever.

XXIV.

These defendants deny the allegation contained in para-
82 graph 28 of complainants' bill.

XXV.

As to paragraph 29 of complainants' bill, these defendants admit the filing of such petition and the obtaining of such order from the Railroad Commission of Texas. They state, however, that such petition and order are the best evidence of their terms and conditions. They deny, however, that the complainants herein had no notice of such hearing. On the contrary, plaintiffs had full notice and these defendants are advised appeared and resisted same.

They further deny the allegation that the Commission had no jurisdiction to hear the matter. On the contrary, said Commission had full authority and were acting fully within their jurisdiction in handing down the order that was handed down and that said order does not deprive complainants of their property without due process of law and does not impair any constitutional right of the complainants whatsoever; and deny any action taken by the Commission was void or that it violates any provision of the Constitution of the United States, especially the provisions cited in said paragraph of complainants bill.

XXVI.

As to paragraph 30 of complainants' bill, they admit the passage of an act by the Legislature of the State of Texas, approved March 22, 1918, but they refer to said Act itself for its terms and conditions.

As to the intent and purposes of said Act, these defendants state that the Act speaks for itself and that the Legislature of the State of Texas had full authority to pass same, and that said Act was expressive of the public sentiment upon matters of this nature.

They expressly deny that said Act or any part thereof
83 is void or that it deprives the complainants herein of any constitutional rights whatsoever, especially the constitutional rights named and mentioned in said paragraph.

XXVII.

As to paragraph 31 of the complainants' bill, these defendants expressly deny the allegations contained therein, and say that the removal of said tracks will not materially affect the business of the

complainants herein in preventing them from obtaining switching facilities and they deny that the removal of said track will render the structure now owned by complainants valueless and they expressly deny that plaintiffs business will be interrupted or interfered with or that irreparable and unascertainable damages will be occasioned to them.

XXVIII.

As to paragraph 32 of complainants' bill, these defendants expressly deny same.

XXIX.

As to paragraph 33 of complainants' bill, these defendants expressly deny the allegation contained in said paragraph, and expressly deny that plaintiffs have any right to an injunction of any character.

XXX.

As to paragraph 34 of complainants' bill, these defendants deny that the complainants have any right to the relief prayed for in said paragraph.

XXXI.

They expressly deny that plaintiffs have any cause of action for damages or any claim whatsoever as against these defendants and they deny that plaintiffs have any cause of action as against these defendants whatsoever.

84 And for further answer in this behalf, these defendants say:

That, long prior to July 10, 1912, the date of the passage of the ordinance authorizing the construction of the industry track to Armour's plant, said ordinance being Exhibit "C" to plaintiffs' bill, the matter of separation of grades of the track of The Texas & Pacific Railway Company on Pacific Avenue and the streets crossing same had been agitated by the citizens of Dallas and by the City Council of Dallas, and the best means of accomplishing this purpose had been discussed and investigated both by the City of Dallas and by The Texas & Pacific Railway Company.

That, the line of road of The Texas & Pacific Railway Company traverses the City of Dallas from east to west; from its crossing with the Houston & Texas Central Railroad Company in East Dallas to the Trinity River, the west boundary of the City of Dallas, the line of The Texas & Pacific Railway Company constructed on Pacific Avenue passes within two hundred (200) feet of the retail business district of Dallas. This line of road likewise divides North Dallas from South Dallas, the population of Dallas being situated about one-half south of The Texas & Pacific Railway Company's line of

road and about one-half north. Traffic going from South Dallas to North Dallas, or from North Dallas to South Dallas, must cross the track of The Texas & Pacific Railway Company on Pacific Avenue. This traffic is extremely heavy, especially in the down-town district between Preston Street and Griffin Street.

That, in order to keep abreast with the other roads competing with The Texas & Pacific Railway Company in Texas, The Texas & Pacific Railway Company had been forced to use much heavier power than heretofore, resulting in the handling of much longer trains.

That the traffic passing over the line of The Texas & Pacific
85 Railway Company on Pacific Avenue from the Trinity River, on the west, to the crossing with the Houston & Texas Central Railroad Company in East Dallas, on the east, is very heavy, there being an average of seventy (70) trains passing over this track during the day, and during the busy season more than one hundred (100), and as the track on Pacific Avenue is only one block removed from the most used thoroughfare in the City of Dallas, Elm Street, there is a considerable interruption of traffic desiring to cross Pacific Avenue on account of the great number of freight trains and passenger trains passing over the track of The Texas & Pacific Railway Company. In addition, owing to steep grade, noise, vibrations, smoke, cinders and soot from the moving locomotive and train. All of these conditions seriously interfered with the transaction of public and private business and were a constant source of danger and inconvenience to the public, and, of course, were growing more so as the business of the road increased in future.

Although the City of Dallas did not desire to inflict any hardship upon The Texas & Pacific road, it did desire, and the people of Dallas did desire, these conditions to be remedied, and The Texas & Pacific Railway Company at all times was willing to join hands with the City of Dallas to remedy this condition if it could be done without depriving The Texas & Pacific Railway Company of any of its franchises or rights or destroying its industrial territory.

That, Armour & Company of New Jersey and Armour & Company of Texas well knew of the existence of this condition and of the agitation to remedy same, and they had full knowledge at the time of the passage of the ordinance of July 10, 1912, under which this industry track was constructed.

That, owing to the fact that this question was being agi-
86 tated in 1912, and a solution was being worked out, at the time of the passage of said ordinance, exhibit "C" to complainants' bill herein, the City of Dallas embodied in said ordinance, for the express purpose of covering this condition, the following:

"Section 2. That the right, privilege and franchise hereby granted is granted subject to the City Charter and ordinances of the City of Dallas and such future charters and ordinances as may hereafter be passed and the City expressly reserves the right to at all times amend or alter the ordinance hereby granted."

Owing to the fact that a solution of this question was pending and that changes in the grade line of The Texas & Pacific Railway Com-

pany would possibly be made, or an arrangement be made by which a separation of grades would be obtained, or an abandonment of the tracks might be had, the City of Dallas embodied in said ordinance, exhibit "C" to complainants' bill, the following Section 3, which reads as follows:

"Section 3. That the right and privilege hereby granted is granted for a period of twenty years from the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific Avenue, then in that event this franchise shall be subject thereto, and the said grantee shall, during said time, pay, on the second day of January in each and every year, the sum of Ten Dollars per year, as a bonus for the right, privilege and franchise hereby granted, provided that Ten Dollars shall be paid for the year 1912."

That, the sole and express purpose of sections 2 and 3 was to reserve to the City of Dallas the right to cancel this ordinance or amend or change same if it so desired, especially did it reserve the right to cancel same in the event The Texas & Pacific Railway Company should be required to abandon, elevate, or place in subways, said main tracks on Pacific Avenue, and the said Armour & Company had full knowledge of this fact, and accepted all rights, if any they obtained under said ordinance, subject to these provisions.

87 The Texas & Pacific Railway Company knew full well that the City of Dallas had no right to abrogate or cancel the franchise of The Texas & Pacific Railway Company on Pacific Avenue, or require it to abandon same for the use of its tracks. The Texas & Pacific Railway Company, however, did recognize the right of the City of Dallas in the exercise of its police power to require a separation of grades, if same was practicable. The Texas & Pacific Railway Company knew, however, that its franchise over the line on Pacific Avenue obtained from the City of Dallas had only a period of some twenty-three years to run, and with this knowledge it could safely assume that at the expiration of this franchise it might have considerable trouble in having same renewed by the City of Dallas. Again, The Texas & Pacific Railway Company was willing to meet the situation if it could be met without the loss to it of its franchise or industrial rights as it appreciated that the situation was one that should be changed if possible.

Under these conditions, the various negotiations continued between the City of Dallas and the officials of The Texas & Pacific Railway Company, and said negotiations were pending at the time The Texas & Pacific Railway Company was placed in the hands of J. L. Lancaster and Pearl Wight as Receivers. The result of these negotiations culminated in the agreement evidenced by contract between the City of Dallas, The Texas & Pacific Railway Company, Pearl Wight, Receiver, and the Wholesale District Trackage Company, same being exhibit "D" to complainants' bill. That, under the terms of said agreement, The Texas & Pacific Railway Company is protected in its industrial rights, and as a part of this agreement, The Texas & Pacific Railway Company has agreed upon a contract

with the Houston & Texas Central Railroad Company for the use of a belt line constructed by the Houston & Texas Central Railroad Company which will give to The Texas & Pacific Railway
88 Company in perpetuity a trackage rights over the belt line by means of which its trains can pass through the City of Dallas without the necessity of using the segment of track which they have agreed to remove on Pacific Avenue. That, this agreement will relieve the situation and will bring about a solution of the question in so far as the City of Dallas is concerned. That, Armour & Company have no right to interfere or in any wise object to this arrangement; that they have no rights, contractual or otherwise, that will be affected by this arrangement, or if affected, Armour & Company of New Jersey and Armour & Company of Texas accepted all rights and made all contracts concerning their plant and the industry track serving same under the ordinance of July 10, 1912, with full knowledge that The Texas & Pacific Railway Company and the City of Dallas had full authority to abrogate such franchise in the event they could agree upon an arrangement for the removal of the tracks of The Texas & Pacific Railway Company on Pacific Avenue, or a change of grade either by lowering or raising said tracks.

That, even though The Texas & Pacific Railway Company could not be forced to abandon its franchise on Pacific Avenue and remove its tracks therefrom, Armour & Company well knew that the City had the right to require a separation of grade and a separation of grade, as provided in Section 3 of the ordinance, gave to the City the right to cancel the franchise for the operation of the industry track serving Armour's plant.

Upon an investigation as to whether or not a separation of grades was possible, it was found that the lowering of the tracks on Pacific Avenue or placing same in a tunnel was impracticable owing to the fact that one end of the tunnel was at Trinity River, which river, at flood time, would be above the level of the tunnel and the tunnel would be flooded. It was further discovered that the cost of
89 raising the grade would be enormous, approximately three million dollars, ($3,000,000.00), if not more, and with the grade raised, on account of the steepness of same, the noise, vibration, smoke, cinders and soot from the moving steam locomotives and trains would still continue to the inconvenience of both the public and private business.

That, the arrangement so made, as evidenced by said contract, exhibit "D," is the best arrangement that could be made for the public, for the railroad, and for the Receiver, and was one in contemplation at the time the ordinance of July 10, 1912, was passed and Armour & Company have no right to object to same, and any and all rights they may have obtained under said ordinance were taken expressly subject to sections 2 and 3 which sections gave the right to the City to abrogate said franchise should conditions arise requiring the separation of grades or the removal of the track, and said complainants herein have no cause of action either by injunction, or for damages, or otherwise, against these defendants and the

City of Dallas on account of the action taken as evidenced by said contract, exhibit "D," to complainants' bill.

These defendants ask that said bill be dismissed, and that they go hence with their costs.

PEARL WIGHT,
Receiver of The Texas & Pacific Railway Co., Defendant.
By THOMAS J. FREEMAN,
General Counsel for Receiver.
THE TEXAS & PACIFIC RAILWAY CO.,
Defendant,
By H. GENERES DUFOUR,
Its Counsel.
GEORGE THOMPSON,
Of Counsel.

90 *Motion of Pearl Wight, Receiver, and of The Texas & Pacific Railway Company to Dismiss Bill of Complaint.*

Filed February 3, 1919.

Now comes Pearl Wight, as Receiver of The Texas & Pacific Railway Company, one of the defendants named in the above styled and numbered cause, and The Texas & Pacific Railway Company, another defendant named in the above styled and numbered cause, and move the Court to dismiss the bill of complaint herein as to these defendants, upon each of the following grounds;

First. It appears from Complainants' bill herein that this Court is without jurisdiction to entertain this cause.

Second. The allegations of Complainants' bill herein fail to allege a state of facts or any conclusion of law that give to this Court any jurisdiction to entertain any cause of action as against these defendants.

Third. Because it appears from Complainants' bill herein that this suit is not one between citizens of different states. It appears from the bill herein that one of the Complainants herein is a resident and citizen of the State of Texas, to-wit: Armour & Company of Texas.
Another Complainant is a resident and citizen of the State of
91 New Jersey. Two of the Defendants, the City of Dallas, and the Wholesale District Trackage Company, as appears from Complainants' bill, are both citizens and residents of the State of Texas. That, The Texas & Pacific Railway Company, one of the defendants, is a corporation incorporated underand by virtue of an Act of Congress of the United States, and that Pearl Wight, Receiver, is a citizen of the State of Louisiana.

Fourth. Because it appears from Complainants' bill that this is not a civil suit or controversy arising under the Constitution of the United States or any law of the United States.

Fifth. Because it appears from Complainants' bill that if Complainants have any cause of action, said cause of action is one at law and not in equity.

Wherefore, for these and other good reasons appearing upon the face of Complainants' bill, these defendants ask that this cause be dismissed.

THOMAS J. FREEMAN,
Counsel for Pearl Wight, Receiver.
H. GENERES DUFOUR,
Attorneys for The Texas & Pacific Ry. Co.

GEORGE THOMPSON,
Of Counsel.

92 *Order Overruling Defendants' Motions to Dismiss Cause.*

Filed and Entered March 5, 1919.

Be it remembered that upon this date came on to be heard the motions to dismiss this cause heretofore filed by the defendants The City of Dallas, Texas & Pacific Railway Company and Pearl Wight, Receiver of the Texas & Pacific Railway Company and the court after hearing said motions and the argument of counsel thereon, and upon consideration thereof, is of the opinion that the law is against said motions and that they should be overruled.

It is therefore considered, ordered, adjudged and decreed by the court that said motions to dismiss aforesaid be and the same are hereby in all things overruled, and the costs incurred thereon are taxed against the said defendants presenting said motions.

To this action of the court in so overruling said motions the said defendants herein named, and each of them, in open court excepted and now have the said exceptions entered of record.

ROBERT T. ERVIN,
Judge.

From Equity Journal 1, page 300.

93 *Answer of City of Dallas.*

Filed March 15, 1919.

Now comes the City of Dallas, one of the defendants in the above styled cause and for answer herein, says:

1.

Defendant is without knowledge as to the facts alleged in paragraphs 1, 2, 3, 4 and 5 of plaintiffs' original petition and demands strict proof thereof.

2.

Defendant admits those facts set out in paragraph 6 of plaintiffs' said petition.

3.

Defendant denies the allegations set out in paragraph 7 of plaintiffs' said petition.

4.

Defendant admits that part of paragraph 8 of plaintiffs' wherein it is alleged that prior to the time of the appointment of the receivers said railway company owned and operated a line of railway extending from the city of New Orleans to the state line of Texas and Louisiana; and from said state line east and west through the State of Texas, traversing the City and County of Dallas. That in 1872 said railway company built and operated its line of railroad on what was then and is now known as Pacific Avenue in the City of Dallas, for a distance of some two miles east and west. At that time what is known as the City of Dallas was a village consisting principally of the Court House, square and primative buildings surrounding same.

As to whether the use or appropriation and occupancy by said railway company of said Pacific Avenue when first built and thereafter, was in all respects, lawful, defendant is unable to say and demands strict proof thereof.

Defendants admits that said village of Dallas eventually grew into a town and the town into the existing city. That it grew in an easterly direction along those certain principal streets known as Elm, Main and Commerce Streets, all of which are parallel to Pacific Avenue.

94 Defendant does not admit that the said Pacific Avenue because of the location of the tracks of said railway company thereon, because, was and still is devoted to industrial enterprises requiring switch tracks and shipping facilities and same were then and ever after served by said tracks and switching facilities afforded by the railway company under and by virtue of appropriate ordinances of said City of Dallas authorizing the same, but demands strict proof of said allegation.

Defendant admits that the other streets named in plaintiffs' said petition in said paragraph 8 were and are devoted to wholesale and retail purposes.

Defendant admits that prior to April 12, 1890, the Texas & Pacific Railway Company had a single line main line track on Pacific Avenue and that on April, 12th, 1890, said railway company filed with the mayor and Alderman of the City of Dallas a petition for a franchise to construct and operate double tracks on said Pacific Avenue which was in writing and a copy thereof attached to plaintiffs' said petition and is here now referred to and speaks for itself as to the terms and conditions of said petition for said franchise and is

open to the construction of the Court and the construction placed thereon by plaintiffs in its said pleading are not agreed to, but strict proof thereof is demanded.

Defendant admits that the City Council or Board of Commissioners of the City of Dallas did pass an ordinance on April 14th, 1890 in response to said petition, as plead by plaintiffs, a copy of which is attached to plaintiffs' said petition marked "Exhibit B" and is here, now, referred to, in which its provisions, terms and conditions are set out and said ordinance is the best evidence of its terms and conditions, and this defendant calls for strict proof of same and strict proof of what was done or performed by the said railway company under the terms and conditions of said ordinance.

86 Defendant does not admit, but denies that said railway company by reason of the performance of the alleged provisions and conditions of said ordinance acquired and has a valid, subsisting, irrevocable contract with the City of Dallas, and vested rights to use and appropriate said Pacific Avenue and that such rights will continue to exist until to wit:—April 13th 1940 and there exists no legal or other authority on the part of the said City of Dallas to impair said vested rights of said railway company and that said vested rights of said railway company is protected by that part of the four enth amendment to the Constitution of the United States which provides:—

"Nor shall any state deprive any person of Life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"

and denies that such right is further protected by that portion of the fifth amendment of the Constitution of the United States which provides:—

"No person * * * shall be deprived of life, liberty of proper y without due process of law, nor shall private property be taken for public use without just compensation"

and denies that such vested right was further protected by that portion of Section 10 Article 1 of the Constitution of the United States which provides:— .

"No state shall * * * pass and * * * impairing the obligation of contract"

and demands strict proof thereof.

7.

It appears that plaintiffs' said petition contains two paragraphs 8. Replying to the second paragraph 8, defendant is without knowledge as to the facts alleged therein in regard to the condition upon which Armour of New Jersey purchased the property described in said paragraph and demands strict proof thereof.

Defendant denies that it had knowledge of the condition upon which said property was purchased by Armour of New Jersey and is without knowledge as to whether or not said purchase would
95 have been consummated had not the City of Dallas agreed to grant a franchise for the switch to serve the plant to be erected upon said lot and had no, the said railway company agreed to construct, maintain and operate said switch track, and that the said railway and the City of Dallas knew these facts, but on the contrary alleges that the City of Dallas gave its consent for the construction of said switch described by plaintiffs subject to the right to remove said switch when the public safety required the removal thereof.

Defendant demands strict proof of all of the allegations contained in said paragraph 8 relative to the actions of J. E. Lee and the other commissioners and Mayor of the City of Dallas as alleged in said petition of plaintiffs and states that the report of the Board of Commissioners of the City of Dallas upon the petition filed by the Texas & Pacific Railway Company and Armour and Company et al., is in writing, speaks for itself and should be construed by the Court and that the construction placed thereon by plaintiffs should not be followed.

Defendant is without knowledge as to the motives that prompted plaintiffs in consum-ating the conditional contract plead by it in paragraph 8 and demands strict proof of same.

Defendant denies that the deed of dedication as plead by plaintiffs in paragraph 8 of said petition was in consideration *on* an irrevocable franchise or contract from the City to said Texas & Pacific Railway Company and Armour & Company as plead by plaintiffs.

Defendant denies all facts alleged in said paragraph 8 except as herein admitted and demands strict proof thereof.

6.

Defendant is without knowledge as to all facts set out and plead in paragraph 9 of plaintiffs' said petition and demands strict proof thereof.

7.

Defendant admits that plaintiffs' and said railway company filed with and presented to the Mayor and Commissioners of the City of Dallas a petition as set out in paragraph 10 of plaintiffs' said petition which said petition is in writing and set out in plaintiffs'
97 pleading and states the terms and conditions of said petition and speaks for itself.

8.

As to paragraph 11 of plaintiffs said petition, defendant states that it is not advised as to the beliefs and motives that prompted plaintiffs in taking the actions and doing the things set out in said paragraph 11, but admits that the Board of Commissioners of the City of Dallas

did pass the ordinance described in said paragraph which ordinance is in writing and that the terms and conditions of said ordinance are the best evidence as to its meaning, force and effect, and admits that plaintiffs did execute *its* deed of conveyance of date July 1st, 1912 to the City of Dallas dedicating to said City for street purposes the land therein described and that the railway company did accept said ordinance by written acceptance filed with the City Secretary of the City of Dallas as set out by plaintiffs in said paragraph of said pleading, but defendant denies that said ordinance became, was and is a subsisting agreement between plaintiffs, the railway company and the City of Dallas whereby and wherein said plaintiff acquired vested rights which are protected and guaranteed to it under and by virtue of the different provisions of the Constitution of the United States as set out by plaintiffs in said paragraph 11 of said pleading and that said ordinance will continue to remain so valid and subsisting until July, 17th 1932 and defendant further affirmatively pleads that it has the right to require the removal of said switch and the removal of the segament of the Texas & Pacific Railway main line described in plaintiffs' pleading as will be fully set out in detail under appropriate paragraphs of this pleading wherein defendant will set out affirmatively its rights and defenses against plaintiffs' said bill.

All facts set out in said paragraph 11 which are not admitted defendant demands strict proof thereof.

9.

As to paragraph 12 of plaintiffs' said petition, defendant admits that the Legislature passed the laws as set out in said para-
98 graph, but does not admit the construction placed thereon by plaintiffs.

10.

As to the facts alleged in paragraph 13 of plaintiffs' said petition, defendant is without knowledge except that a building was built thereon, and demands strict proof of said facts.

11.

As to the facts plead in paragraph 14 of plaintiffs' said petition, this defendant is without knowledge as to the railway company and the motive which prompted the railway company to construct the switch track or side track, and to operate said switch track or side track and why same was constructed and demands strict proof thereof. Defendant specially denies that it inspired or confederated with any other defendant herein to remove said switch track and to abandon the operation of same and to disconnect or take up the same or the main track of defendant railway company, and is without knowledge as to whether or not compensation has been offered plaintiff by defendant railway company, but admits that this defend-

ant has not offered any compensation to plaintiffs for the removal of said switch track and the segament of the main line, and will not offer any compensation for so removing same. As to ail facts not herein admitted, defendant demands strict proof thereof.

12.

As to the facts set out in paragraph 15 of plaintiffs' said petition, defendant is without knowledge as to said facts and demands strict proof thereof.

13.

As to the facts set out in paragraph 16 of plaintiffs' said petition, defendant is without knowledge as to said facts and demands strict proof thereof.

14.

As to the facts set out in paragraph 17 of plaintiffs' said petition, defendant denies that the removal of said switch and main line tracks of said railway company will render the structure of plaintiffs worthless as plead by them and demands strict proof of the facts set out in said paragraph.

99

15.

As to the facts set out in paragraph 18 of plaintiffs' said petition, defendant neither admits nor denies said allegations but demands strict proof thereof.

16.

As to all those facts plead in paragraph 19 of plaintiffs' said petition, defendant denies that is has entered into any conspiracy or confederation with its co-defendants to voluntarily remove the tracks of said railway company from Pacific Avenue as plead by plaintiffs, but admits that a contract in writing for the removal of the segament of the main line track on Pacific Avenue from Lamar Street to Central Avenue, a distance of about four thousand three hundred and eighty feet, a copy of which contract is attached to plaintiffs' pleading and which sets out and evidences the facts relating to the said removal contract and is the best evidence as to its meaning, force and effect and is here now referred to.

This defendant understands that its co-defendant has entered into a contract with the Houston & Texas Central Railroad Company whereby defendant Texas & Pacific Railway Company will use the railroad track of said Houston & Texas Central Railroad Company and abandon the use of the Texas & Pacific Railway Company's tracks on Pacific Avenue — the terms and conditions of which defendant is not now familiar, but that said contract will be produced and read in evidence upon the trial of this cause and will be the best evidence as to its meaning, force and effect.

All facts set out in said paragraph which are not admitted by defendant, defendant demands strict — thereof.

17.

As to all those facts set out in paragraph 20 of plaintiffs' said petition defendant is without knowledge and demands strict proof thereof.

18.

As to the facts as set out in paragraph 21 of plaintiffs' said petition, defendant admits that it, together with its co-defendant,
100 entered into a written contract, a copy of which is attached to plaintiffs' pleading marked "Exhibit D" and that said written contract is the best evidence as to its meaning, force and effect, and defendant denies that it entered into said contract in pursuance of a confederation of conspiracy between and with its co-defendant as alieged by plaintiffs.

Defendant also admits that on August 23rd, 1918, its Board of Commissioners in open session and in the exercise of legislative power, did pass the resolution set out in paragraph 21 of said pleading which is in writing and is the best evidence as to its meaning, force and effect.

Defendant denies that said resolution and said contract as plead by plaintiffs are illegal and void and that they deprive plaintiffs of their property without due process of law and that such acts are violative of the constitution of the United States and that they impair and destroy the vested rights of plaintiffs under and by virtue of certain ordinances of the City of Dallas as plead by plaintiffs and deny that said ordinances or resolutions above set forth were enacted, passed and adopted, and the contract made and attached to plaintiffs' said petition and marked "Exhibit D" was executed by defendant City of Dallas without notice or opportunity to plaintiffs to be heard and to complain of same, and that said contract and matters were brought about by conspiracy of all of the defendants or either of the defendants as set out and plead by plaintiffs in said paragraph of said petition. That all facts not admitted by defendant herein and contained in said paragraph are denied and strict proof of same required by defendant.

19.

As to the facts alleged in paragraph 22 of plaintiffs' said petition, defendant admits it is to pay the Wholesale District Trackage Co. $100,000.00 in consideration of certain real estate as set out in "Exhibit D" attached to plaintiffs' said petition but denies that said $100,000.00 constitutes part of the consideration on the part of the City as an inducement to its co-defendant to co-operate to violate, interefere with, impair and destroy the vested contractual rights of

plaintiffs with the railway company and said City of Dallas as
101 plead by plaintiffs, and defendant denies that the contract to pay the said $100,000.00 is illegal and void or that the City is exceeding its charter powers in so entering into said contract.

20.

As to the facts alleged in paragraph 23 of plaintiffs' said petition, defendant admits that the plant of Fulton Bag & Cotton Mills is located upon Pacific Avenue as plead by plaintiff; that Preston Street is one of the principal thoroughfares of the City of Dallas which crosses Pacific Avenue. That an electric street railway is being operated on Preston Street. That there is a side track which serves the plant of Fulton Bag & Cotton Mills and that in the contract attached to plaintiffs' pleading marked "Exhibit D" it is provided that said side track and switch which serves said plant of Fulton Bag & Cotton Mills shall remain undisturbed for the period of five years. That said contract is in writing and is the best evidence as to what it contains and defendant denies that said agreement and contract would operate as a discrimination against the rights of plaintiff and denies that plaintiffs have any interest in reference thereto and denies that it is entirely practicable for said side track to be so extended as to serve the plant of plaintiffs without public or other detriment, but alleges the facts to be that if said side track was extended to serve the plant of plaintiffs, that such extension would result in serious and permanent public detriment. Defendant specially denies all facts alleged by plaintiffs in said paragraph 23 of said petition not hereinabove admitted.

21.

As to the facts alleged in paragraph 24 of plaintiffs' said petition, defendant denies said facts with the exception that a contract was entered into as set out in "Exhibit D" of said petition and demands strict proof thereof.

22.

Defendant denies the facts alleged in paragraph 25 of plaintiffs' said petition except in so far as same relate to the terms of the contract marked "Exhibit D" attached to plaintiffs' pleading which is the best evidence of said contract.

102 23.

Defendant says the construction placed on said contract marked "Exhibit D" attached to plaintiffs' petition as set out in paragraph 25 of plaintiffs' said pleading is not the proper construction of said contract and that said contract is in writing and is the best evidence of

said contract and defendant denies the facts alleged in said paragraph and demands strict proof thereof.

24.

Defendant admits that defendant railway company made application to the railroad commission of the State of Texas for authority to move its tracks from the designated portion of Pacific Avenue and thereafter to wit: March 15th, 1918, the railroad commission of the State of Texas granted and passed an order authorizing and permitting defendant railroad company and its receivers to abandon and remove the tracks now located on Pacific Avenue in the City of Dallas between Preston Street and Griffin Street and defendant further admits that it co-operated with defendant railway company in securing such order from the railroad commission of Texas. Defendant denies that said order of the railroad commission was granted and passed without any notice to plaintiffs as alleged in paragraph 28 of plaintiffs' pleading, but alleges the fact to be that plaintiffs did have notice of the application made by defendant railway company and did appear and defend against the order of the railroad commission authorizing the removal of the tracks from a portion of Pacific Avenue. Defendant denies all other facts alleged by plaintiffs in said paragraph 28 of said pleading.

25.

Defendant denies the interpretation placed upon the acts of the Legislature referred to in paragraph 29 of plaintiffs' pleading and says that said acts are statutes and laws of this state and asks that the Court construe same according to their intent and meaning, and denies that said acts are contrary to the Constitution of the United States as plead and alleged by plaintiffs in said paragraph of its pleading.

26.

103 Defendant denies the facts alleged in paragraph 30 of plaintiffs' said petition and demands strict proof thereof.

27.

Defendant denies the facts alleged in paragraph 31 of plaintiffs' said petition and demands strict proof thereof.

28.

Defendant denies the facts alleged in paragraphs 32, 33, 34 and 35 of plaintiffs' said petition and denies that plaintiffs are entitled to the relief therein prayed for, and in this connection says:—

Defendant admits that its co-defendant, Texas & Pacific Railway Company will remove its tracks from Pacific Avenue from Lamar Street to Central Avenue, a distance of about 4380 feet, but denies that such removal is to be voluntarily made, and alleges that such removal is made in obedience to the lawful request and demand of the City of Dallas and in obedience to the demands of the public interests, life, health, comfort and welfare.

Defendant denies that defendants entered into any unlawful or selfish conspiracy, but alleges the fact to be that in everything done and contracted to be done, they are acting in good faith and for the public interest and welfare, and this defendant further alleges that the City of Dallas is a city of approximately 150,000 inhabitants and is incorporated under and by virtue of a special Act of the Legislature of the State of Texas; that it is operating under a special charter granted by the Legislature of the State of Texas and under such charter, the City of Dallas, acting by and through its Board of Commissioners, is given express power to pass and enforce all reasonable police regulations for the protection of the public health, safety, comfort, life, limb and welfare. That it is given express power to require railway companies operating through the City of Dallas to elevate their tracks or place same in subways, to relocate same when such relocation is demanded by the public interest and welfare and to comply with such other reasonable regulations that the City of Dallas may decide to be demanded in the interest of the public welfare, safety and comfort.

The City of Dallas has the further power to acquire by purchase or otherwise any franchise, interest or right held by any Public Utility in any street or public highway of the City of Dallas,
104 and after such purchase to compel the abandonment of such franchise.

That Pacific Avenue is a thoroughfare of the City of Dallas, located adjacent to and running parallel with Main, Elm and Commerce Streets of said city, being the three principal business streets of said city. That said Pacific Avenue is crossed by Lamar, Griffin, Akard, Ervay, Harwood and Preston Streets, all important and much travelled thoroughfares of the City of Dallas. That defendant railway company has two main tracks and numerous switch tracks on said Pacific Avenue. That the tracks and switches on said avenue are so extensive and numerous, and the operation of railways, cars, engines and trains over same are so numerous as to practically destroy said avenue as a public thoroughfare and to endanger the life, limb, comfort and health of the citizenship of the City of Dallas who are compelled to cross said avenue in the conduct of their personal affairs and business. That there are over one hundred trains operated daily on said avenue by the defendant railway company. That Pacific Avenue is the dividing line between North & South Dallas and that possibly seventy per cent of the population of Dallas lives North of said avenue and are consequently compelled to cross said avenue in coming to and going from the business section of the City of Dallas. That the use of said avenue by the defendant railway

company became so burdensome and oppressive as to imperatively demand that the City of Dallas take some action, prompt and efficient, to relieve the situation and to protect the life, limb, comfort, safety and welfare of the citizenship of the City of Dallas. That in obedience to such demand, the City of Dallas heretofore passed certain valid police regulations with reference to the use of the public highways, streets and ways of the said city by railway companies which were not being observed by defendant railway company; that the City of Dallas further threatened, intended and would, but for the action of defendant railway company in signing the contract set forth in plaintiffs' said petition, have passed other ordinances regulating and controlling the use of said avenue by defendant
105 railway company and denying the use of same by said railway company between Lamar Street and Central Avenue in the City of Dallas. That the Texas & Pacific Railway Company could not have operated its trains over said avenue and complied with the reasonable police regulations, ordinances and demands which the City of Dallas heretofore made and which they would have made except for the agreement with said railway company as aforesaid; and said railway company realizing and acknowledging such to be a fact, agreed with the City of Dallas upon a relocation of a small segament of its track upon said Pacific Avenue.

It is not contemplated that the Texas and Pacific Railway Company shall abandon its right to operate its trains into and through the City of Dallas, or to abandon the use of Pacific Avenue except upon the small segament between Lamar Street and Central Avenue in said City, but it is contemplated that the tracks of defendant railway company shall be removed from the small segament on Pacific Avenue and shall be located at some other point in the City of Dallas, and such removal is made in obedience to the imperative demands of the public welfare.

That the contract heretofore executed between this defendant and defendant railway company contemplates that defendant railway company and its receivers shall be given easements and franchises along, over and through other portions of the said City of Dallas and through, along and over other streets in the City of Dallas under the terms of franchises to be granted said railway company and the receivers of said company. That the main line of said defendant railway company runs through the City of Dallas from the East to the West boundary of said City.

Defendant alleges that the public interest demands the removal of defendant railway company's tracks as contemplated in the said contract entered into by and between defendants and such contemplated removal is solely in behalf of public interest and welfare; that if plaintiffs have any contract with defendant railway company or with the City of Dallas that they have an adequate remedy at law.

106 Wherefore, this defendant prays that plaintiffs' prayer for injunction be denied and defendant be adjudged to go hence

without day and that petition of plaintiffs be dismissed as being without equity.

CITY OF DALLAS,
By A. S. HENDRICKS,
Counselor.
A. S. HENDRICKS,
G. M. BRANDER,
G. P. DOUGHERTY,
Counselors for Defendant, City of Dallas.

107 *Plaintiffs' Motion to File Amendment to Bill.*

Filed May 28, 1919.

To the Honorable the Judge of said Court:

Come now the plaintiffs and move this Honorable Court to permit them to file an amendment to their bill, such amendment being herewith tendered.

Respectfully submitted,

ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

F. M. ETHERIDGE,
Counsel.

108 *Plaintiffs' Amendment to Their Bill.*

Filed May 28, 1919.

Come now the plaintiffs, leave of the court being had so to do, and file this their amendment to their bill of complaint herein filed on December 21, 1918, and for amendment add to the concluding sentence of paragraph 22 of said bill the following, to-wit:

Section 42 of Article XIV of the charter of the City of Dallas provides that no contract shall be binding upon the City unless it has been signed by the Mayor and countersigned by the Auditor and the expense thereof charged to the proper appropriation, and plaintiffs aver that the purported contract made Exhibit "D" to their said bill was not countersigned by the Auditor of the City of Dallas, nor was the expense thereof charged by the Auditor of the City of Dallas to the proper or any other appropriation, and they, therefore, aver that said contract in so far as the said City of Dallas is concerned is illegal and void, and they pray that the said City of Dallas be enjoined from the performance or attempted performance thereof.

ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

F. M. ETHERIDGE,
Counsel.

109 *Order Granting Plaintiffs Leave to File Amendment to Bill.*

Filed and Entered June 5, 1919.

On this the 5th day of June, A. D. 1919, came regularly on to be heard the motion of the plaintiffs to file their amendment to their bill of complaint herein, and the Court being advised in the premises is of opinion that said motion should be and the same is hereby granted.

R. L. BATTS,
Judge Presiding.

110 *Supplemental Answer of Deft City of Dallas.*

Filed June 5, 1919.

Now comes defendant, City of Dallas, leave of the Court having been first had and obtained and files this, its supplemental answer to the amendment of the said plaintiffs filed on the 28th. day of May, A. D. 1919, wherein the said plaintiffs amend paragraph 22 of its petition filed on the 21st day of December, A. D. 1918, and by way of answer, this defendant says:—

1.

Defendant admits that Section 42 of Article XIV of the Charter of the City of Dallas relates to certain contracts entered into by the City of Dallas, but does not admit that plaintiffs' amended bill sets forth the exact language of the Charter nor does it admit the legal construction placed thereon by the said plaintiffs.

This defendant avers that the contract herein complained of by the said plaintiffs is not of the class of contracts that come within the purview of the said charter provision, the said section of the Charter being as follows:—

"No contract shall be entered into by the Board of Commissioners until after an appropriation has been made therefor, nor in excess of the amount appropriated, and all contracts shall be made upon specifications, and no contract shall be binding upon the city unless it has been signed by the Mayor and countersigned by the Auditor and the expense thereof charged to the proper appropriation; and whenever the contract charged to any appropriation equals the amount of said appropriation, no further contracts shall be countersigned by the Auditor.

All contracts of whatever character, pertaining to public improvements or the maintenance of public property of said city, involving an outlay of as much as five hundred ($500) dollars
111 shall be based upon specifications to be prepared and submitted to and approved by the Board of Commissioners;

and after approval by the Board of Commissioners, advertisement for the proposed work, or matters embraced in said proposed contract shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be published in a daily newspaper not less than five times. All bids submitted shall be sealed, shall be opened by the Mayor in the presence of the Board of Commissioners and shall remain on file in the office of the City Secretary and be open to public inspection for at least forty-eight hours before any award of said work is made to any competitive bidder.

The Board of Commissioners shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid; and if, in the opinion of the Board of Commissioners, none of said bids are satisfactory, then the Board of Commissioners may have said work done by day labor, and a detailed statement of all such work done by day labor, showing the cost of same, shall be filed with the Board of Commissioners. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the City Secretary, subject to the inspection of all parties desiring to bid."

2.

Defendant avers that if the contract complained of is within the terms of said Charter provision or belongs to the class of contracts contemplated by said Charter provision, then this defendant admits that the said Auditor did not countersign the original contract and that the same is not countersigned by him up to this time, and in this behalf defendant would show that after the execution of said contract by the Mayor and Secretary, the contract was thereafter sent to its co-defendants for execution by them.

That subsequently the said contract was sent back to this defendant and the same was not called to the attention of the Auditor for his signature.

That in the meantime the said plaintiffs filed their bill for injunction in this Honorable Court on the 21st. day of December, A. D. 1918 and the said plaintiffs during the pendency of this suit before this Honorable Court, did on the 10th. day of May, A. D. 1919, file their bill for an injunction against this defendant together with its co-defendants herein, and upon an ex parte hearing before the Honorable Judge Porter for the 66th Judical District Court of Texas, obtained a temporary restraining order against this defendant and its co-defendants herein, restraining these defendants from carrying out the said contract on the ground that the said
112 contract is void for, among other reasons, that the charter provision, viz:— Section 42 of Article XIV has not been and is not complied with.

That these defendants under the laws of Texas appealed from the said temporary restraining order and the said case is now pending in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

That this defendant and its officers are now under the said restraining order and are prohibited from having the said Auditor countersign said contract and to charge the expense thereof to the proper fund.

That the plaintiffs herein obtained their ex parte restraining order from the said judge of the 68th Judicial District Court and sued for same in the capacity of taxpayers and are now maintaining their said suit in said court in the capacity of taxpayers against this defendant.

That the said judge of the 68th Judicial District Court who resides outside of the district wherein these defendants reside, made his writ returnable to the 14th Judicial District Court of this District. Defendant admits that no specific appropriation was made at the time said contract was entered into, but defendant does not admit that under the provisions of the City Charter of the City of Dallas or under the laws of the State of Texas that this rendered the said contract null and void for the reason that by the terms of the City Charter and more particularly by Section 1 of Article X thereof there is levied a tax of 25¢ on each $100.00 valuation of all taxable property in the City of Dallas for the payment of interest and to create a sinking fund arising out of bond issues for street improvements and it is specially provided that the remainder of the proceeds of such tax shall together with the special assessments collected by the city upon abutting property or its owners for street improvements become a part of a special and sacred fund to be known as the "Street Improvement Fund" which fund shall be used or advanced only for the payment of the cost or part thereof of any street
113 improvement made or constructed under this article.

That the term "street improvement" as used in the said article is defined to mean and include the improvement of any street, avenue, etc. by filling, grading, raising, macadamizing remacadamizing, paving, repairing or otherwise improving the same, etc.

That it affirmatively appears from the said contract herein complained of by the plaintiffs that the purpose of the use of the $100,000.00 was for obtaining land in order to convert the land into and have it become a part of Pacific Avenue.

That the City of Dallas was not and is not now required to make a specific appropriation at the time a contract is entered into contemplating and embracing the making of street improvements. That by the provisions of the Charter the appropriation is made and the fund created by the said special tax.

Wherefore, this defendant prays that plaintiffs' prayer for injunction be denied and that this defendant be adjudged to go hence without day and that said plaintiffs' bill be dismissed as being without equity.

JAS. J. COLLINS,
ED. DAUGHERTY,
THAD B. McCORMICK,
Attorneys for City of Dallas.

114 *Decree.*

Filed June 7, 1919.

On this the 7th day of June, A. D. 1919, came regularly on to be heard the above entitled and numbered cause, and the Court having heard the pleadings, evidence and argument of counsel, is of opinion that the law is with the defendants.

It appearing to the Court, however, that as the issue presented by paragraph 22 of the Bill of Complaint, and by the Amendment to the Bill, was presented to the District Court for the 68th Judicial District of Texas, in a tax-payer's suit brought by complainants herein and others for the use and benefit of themselves and all other tax payers of the City of Dallas, and transferred to and now pending in the District Court for the 14th Judicial District of the State of Texas, numbered 30885-A, and entitled Armour & Company et al., vs. The City of Dallas et al., and that therein complainants and their co-plaintiffs therein upon ex parte hearing, obtained a temporary injunction, restraining the defendants therein, who are the defendants herein, from carrying out the contract of August 23, 1918, by and between City of Dallas, Wholesale District Trackage Company, Texas & Pacific Railway Company and Pearl Wight, as Receiver of the Texas & Pacific Railway Company, which matter of injunction is pending on appeal by such defendants to the Court of Civil Appeals for the 5th Supreme Judicial District of Texas, at Dallas, this Court is of the opinion that it ought not to grant relief on account of such issue:

It is, therefore, ordered, adjudged and decreed by the Court that the plaintiffs' original bill of complaint herein and the amendment thereto, be, and the same are hereby, dismissed at the costs of the plaintiffs. The plaintiffs thereupon duly and in open Court excepted and gave notice of appeal to the Supreme Court of
115 the United States.

Dated June 7, 1919.

R. L. BATTS,
Judge Presiding.

116 *Petition for an Allowance of Appeal.*

Filed July 14, 1919.

To the Honorable the Judge of the District Court of the United States for the Northern District of Texas, at Dallas:

The above named plaintiffs, Armour and Company and Armour and Company of Texas, conceiving themselves aggrieved by the decree made and entered on the 7th of June, 1919 in the above entitled and numbered cause, do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and

pray that this appeal may be allowed, and that the amount of the appeal bond be fixed and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

R. W. SHAUMAN,
CAPPS, CANTEY, HANGER & SHORT,
ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Armour and Company and Armour and Company of Texas.

FRANCIS MARION ETHERIDGE,
Of Counsel.

Dated this the 14th day of July, A. D. 1919.

The foregoing claim of appeal is allowed and the amount of the appeal bond is hereby fixed at the sum of ($1000.00) One Thousand Dollars.

R. L. BATTS,
Judge Presiding.

117 *Plaintiffs' Assignments of Error.*

Filed July 14, 1919.

In connection with their petition for an appeal this day filed in the above entitled and numbered cause, the plaintiffs, Armour and Company and Armour and Company of Texas, assign the following errors committed upon the trial thereof and upon which they rely for a reversal of the decree herein:

1.

The court erred in dismissing plaintiffs' bill of complaint and the amendment thereto.

2.

The court erred in not awarding an injunction as prayed for by the plaintiffs in their bill of complaint and the amendment thereto.

3.

Plaintiffs' bill of complaint herein and the amendment thereto sets up valuable contract rights that are protected by the obligation and contract clauses of the Constitution of the United States and shows that the resultant damage that will ensue upon the commission of the threatened violation of those contract rights is incapable of ascertainment, and therefore plaintiffs are remediless except in a court of equity, and the court erred in dismissing plaintiffs' bill of complaint herein and the amendment thereto.

118

4.

The court erred in not awarding an injunction to restrain the defendant, the City of Dallas, from complying with the contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, because said contract is invalid for that the same was never countersigned by the Auditor of the City of Dallas, and such countersigning is an essential requisite to the validity of the contract by the express provisions of the Charter of the City of Dallas.

5.

The purported contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, is as to the defendant, the City of Dallas, invalid because not countersigned by the Auditor of the said City, and because the Street Improvement Fund was continuously overdrawn from the date of the execution of said purported contract up to May 1, 1919, the close of the fiscal year of the said City of 1918, and therefore by the express provisions of the Charter of said City the Auditor of said City was prohibited from countersigning said purported contract, and the court erred in not so holding.

6.

The Street Improvement Fund being continuously overdrawn from the date of the execution of the alleged contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, to the close of the fiscal year, May 1, 1919, the Auditor of the City of Dallas was by the express provisions of the Charter of said City prohibited from countersigning said purported contract, and after the close of the fiscal year, to-wit May 1, 1919, said contract created an indebtedness and same was void because no provision for the
119 payment of the hundred thousand dollars which the City of Dallas obligated itself to pay to the Wholesale District Trackage Company was provided for, and therefore said contract for the payment of said sum by the said City was void by reason of Section 5 of Article II of the Constitution of the State of Texas which provided that "no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon," and the court erred in not so holding.

7.

The court erred in permitting the witness, R. V. Tompkins, Auditor of the City of Dallas, to testify that, in view of his statement of the accounts of the City, he is ready, if the injunction sued out in the State court is removed, to countersign, as Auditor, the contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of com-

plaint herein, because the said R. V. Tompkins had testified that the hundred thousand dollars contracted to be paid by the defendant, the City of Dallas, to its co-defendant Wholesale District Trackage Company was chargeable to the Street Improvement Fund, and had further testified that the Street Improvement Fund account had been continuously overdrawn from the time of the execution of said purported contract up to the time the said witness testified, because by Section 42 of Article XIV of the Charter of the City of Dallas it is provided that "whenever the contract charged to any appropriation equals the amount of said appropriation, no further contract shall be countersigned by the Auditor."

120 8.

The court erred in permitting the defendants' witness, J. E. Lee, to testify as follows: "I notified Mr. Short that my desire and policy was not to put any more tracks on Pacific Avenue; that there hadn't been any granted for some time and that it was a cherished hope of the people of Dallas some time to remove those tracks that were there", because all oral negotiations leading up to were merged in the subsequent written contract evidenced by the ordinance granted by the City of Dallas to the Texas & Pacific Railway Company, a copy whereof is made Exhibit "C" to plaintiffs' bill of complaint herein.

9.

The court erred in permitting the defendants' witness, J. E. Lee, to testify as follows: "Mr. Short and myself had a great many conversations. I couldn't recall the words but I remember giving him that warning about the proposition. The warning was that we wanted to feel free to remove all tracks from Pacific Avenue", because all oral negotiations leading up to were merged in the subsequent written contract evidenced by the ordinance, a copy of which is made Exhibit "C" to the plaintiffs' bill of complaint herein.

Respectfully submitted,

R. W. SHAUMAN,
CAPPS, CANTEY, HANGER & SHORT,
ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

F. M. ETHERIDGE,
Counsel.

121 *Statement of Evidence, Allowance and Approval Thereof.*

Filed July 14, 1919.

The following is plaintiffs'—appellants'—condensed statement in narrative form of all the testimony essential to the decision of the questions presented by the appeal introduced upon the trial, made in

pursuance of Equity Rule 75 (*b*) and lodged in the clerk's office for the examination of the defendants, as provided by said rule.

1. Plaintiffs put in evidence a duly certified copy of an ordinance of the City of Dallas, approved October 15, 1872, authorizing the Texas & Pacific Railway Company to construct, maintain and operate its line of railroad along and over Pacific Avenue in the City of Dallas.

2. Plaintiffs put in evidence a duly certified copy of the petition of the Texas & Pacific Railway Company to the Mayor and Aldermen of the City of Dallas, of date April 12, 1890, being the same as Exhibit "A" to their bill of complaint herein.

3. Plaintiffs put in evidence a duly certified copy of an ordinance of the City of Dallas granting the Texas & Pacific Railway Company the right to lay a double track on Pacific Avenue and to construct certain side tracks thereon, approved April 14, 1890, being the same as Exhibit "B" to their bill of complaint herein.

122 4. Plaintiffs put in evidence a duly certified copy of the acceptance by the Texas & Pacific Railway Company of said ordinance approved April 14, 1890, as alleged by them in paragraph 8 of their bill of complaint herein.

5. Plaintiffs put in evidence Subdivision 18 of Section 8, Article 2 of the Charter of the City of Dallas, as it existed in 1907, and since, and which reads as follows: "The Board of Commissioners shall have power to authorize steam railways operating their lines from the City of Dallas to other towns and cities beyond its limits to lay their tracks and establish their switches on and over the streets and other property of the City of Dallas or such parts thereof as the board may see fit, subject to the terms of this charter and to such conditions as may be imposed by the Board of Commissioners."

6. Plaintiffs put in evidence Subdivision 28, Section 8, Article 2 of the Charter of the City of Dallas, which reads as follows: "The City of Dallas shall have power to direct and control the laying and construction of railroad tracks, turnouts and switches and to require that they shall be so constructed and laid as to interfere as little as possible with the ordinary travel and use of the streets, and to require that they be kept in repair, to regulate and control the location of cable and other street and railroad tracks and all steam railroad tracks, and to require railway companies of all kinds to construct at their own expense such bridges, viaducts, turnouts, culverts, crossings and other things, as the Board of Commissioners may deem necessary; to regulate the speed of all railroad trains aand street cars and interurban railways within the city limits and their stops at street crossings and to require railroad and street car companies and interurban railways to keep the streets through which they run, in repair, and to require all railroad companies and street railway and
123 interurban companies to light the streets over or across which street railway, interurban or railroad cars are operated, when-

ever deemed necessary and to prescribe the kind of light to be used, and to levy special taxes or assessments upon them for street improvements the same as against property owners; to require all railroad companies, street railway companies or interurban railway companies to maintain gates or watchmen at street crossings when ordered by the Board of Commissioners."

7. Plaintiffs put in evidence Subdivision 28a of Section 8, Article 2 of the Charter of the City of Dallas, which reads as follows: "The City of Dallas shall have the power to require any or all railroad companies operating any track or tracks upon or across any public streets of the City of Dallas, to reduce such track or tracks below the level of the streets intersected or occupied by such track or tracks or to elevate such track or tracks above the level of the streets intersected or occupied by such track or tracks, and to require the company or companies owning or operating such track or tracks, to provide necessary and proper crossings for the public travel at intersecting streets; all of such work to be done in the manner required by the City of Dallas. (Amendment of 1914.)"

8. Plaintiffs put in evidence Subdivision 42 of Article XIV of the Charter of the City of Dallas, which reads as follows: "No contract shall be entered into by the Board of Commissioners until after an appropriation has been made therefor, nor in excess of the amount appropriated, and all contracts shall be made upon specifications, and no contract shall be binding upon the city unless it has been signed by the Mayor and countersigned by the Auditor and the expense thereof charged to the proper appropriation; and whenever
124 the contract charged to any appropriation equals the amount of said appropriation, no further constracts shall be countersigned by the Auditor.

"All contracts, of whatever character, pertaining to public improvements, or the maintenance of public property of said city, involving an outlay of as much as five hundred ($500) dollars shall be based upon specifications to be prepared and submitted to and approved by the Board of Commissioners; and after approval by the Board of Commissioners, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be published in a daily newspaper not less than five times. All bids submitted shall be sealed, shall be opened by the Mayor in the presence of a majority of the Board of Commissioners, and shall remain on file in the office of City Secretary and be open to the public inspection for at least forty-eight hours before any award of said work is made to any competitive bidder.

"The Board of Commissioners shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid; and if, in the opinion of the Board of Commissioners, none of said bids are satisfactory, then the Board of Commissioners may have said work done by day labor, and a de-

tailed statement of all such work done by day labor, showing the cost of same, shall be filed with the Board of Commissioners. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the City Secretary, subject to the inspection of all parties desiring to bid."

9. Plaintiffs put in evidence the conditional contract of sale and purchase by J. Ogden Armour, acting for Armour and Company, for the purchase of the lot in question on the northwest
125 corner of Harwood Street and Pacific Avenue in the City of Dallas, the condition being as is set forth in paragraph 8 of their bill of complaint herein.

10. Plaintiffs put in evidence the oral deposition of W. M. Short, who testified as follows:

"My name is W. M. Short. I reside at Fort Worth, Texas. Am an attorney at law and am a member of the law firm of Capps, Cantey, Hanger & Short. My firm represented Armour & Company in the matter of their purchase of a lot on the corner of Pacific Avenue and Harwood Street in the city of Dallas in 1912, and I had the particular charge of the examination of the title and the handling of the legal phases of the matter here in Dallas. This is the original contract of purchase by J. Ogden Armour for the lot in question. I signed it as a witness. The condition was inserted in the contract because Armour and Company knew from experience that it would be impossible to operate their branch plant without switching facilities. We knew it would be necessary to obtain from the city of Dallas a franchise to construct a switch and also to obtain from the Texas & Pacific Railway Company an agreement to put in, maintain and operate the switch, and we secured this contract for the property but did not want the property unless we could get that switching franchise from the city and the agreement from the Texas & Pacific Railway Company, and that was the reason of the insertion of the conditional clause in the contract. I knew John W. Everman on April 4, 1912. He was connected with the Texas & Pacific Railway Company as General Manager with headquarters at Dallas. I knew W. L. Hall at that time. He was General Attorney of the Texas & Pacific Railway Company with his headquarters in Dallas. As representing Armour and Company I had oral negotiations with both Ever-
126 man and Hall about the purchase of said lot and the construction of a switch, and both of them were advised that the purchase of the lot was upon the condition stated. I conversed with both of them relative to whether the Texas & Pacific Railway Company would or would not move its tracks from Pacific Avenue in Dallas. Mr. Everman said he was advised by the Legal Department of the Company that the city would have no power nor authority to require the removal of the tracks from Pacific Avenue at any time and referred me for any further opinion on that subject to Judge Hall. Judge Hall stated that there was no power in the city to remove the tracks from Pacific Avenue and that hell would freeze over before the Texas & Pacific Railway Company would move off Pacific Avenue. Judge Hall is

dead. Armour and Company were to pay $50,000 for the lot if they consummated their purchase. The purchase was consummated and the $50,000 cash was paid. I drew the side track ordinance but it was afterwards revised by the City Attorney of Dallas. Armour and Company made a deed of dedication to the city of certain portions of the lot in question. I am inclined to think that the dedication deed was drawn by the City of Dallas and sent to us to be executed. Mr. Everman knew that Armour and Company was to make a deed of dedication. I received in the due course of mail the following letter from J. E. Lee, Commissioner of Streets and Public Property of the City of Dallas, of date June 7, 1912, and it reads as follows:

'Dallas, Texas, 6-7-12.

Mr. W. M. Short, Capps, Cantey, Hanger & Short, Ft. Worth, Texas.

DEAR SIR:

Pursuant to your request of today I am enclosing you herewith the deed of dedication to be executed by the proper officials of Armour & Company the engineer having filled in the field notes for the two tracts of land.

127 The Board of Commissioners has passed this ordinance to second reading, and are ready to pass it to third reading when you shall have indicated to us that the land has been acquired by Armour & Company; that the ordinance is satisfactory and shall have returned the properly executed deed of dedication.

Yours truly,

(Signed) J. E. LEE,
Commissioners of Streets and
Public Property.'

"The following letter dated Dallas, Texas, May 1, 1912, addressed to Wm. Hanger, signed by James J. Collins, City Attorney of the City of Dallas, was received. Said letter reads as follows:

'Dallas, Texas, May 1st, 1912.

Hon. Wm. Hanger, Attorney-at-Law, Ft. Worth, Texas.

DEAR SIR:

In accordance with my agreement with you, herewith you will find copy of ordinance granting a switch track right to Texas & Pacific Railway Co. on Pacific Avenue.

I beg to advise that this has been delayed awaiting the Engineer getting up description of the property to be dedicated by the Armour people.

Trusting this is satisfactory, and hoping to be of some future service to you, I am

Yours very truly,

(Signed) JAMES J. COLLINS,
City Attorney.'

"On June 13, 1912, I, acting for my firm, wrote to Mr. J. W. Everman, General Manager, Texas & Pacific Railway Company, Dallas, the following letter:

128 'DEAR SIR:

We have had various interviews with the Board of Commissioners of the City of Dallas with reference to the proposed switch, and they have agreed upon a form of ordinance and passed to the second reading, the same as enclosed herewith.

The deal of Armour and Company for the property in question will be ready to be closed within the next few days, and Armour and Company will then be prepared to file the dedication of two corners and the ordinance will be placed upon final passage.

We are not advised as to whether or not you have had an opportunity to examine the ordinance as finally drawn by the City Attorney, and are therefore enclosing a copy for your examination, and we would be glad if you would advise us at once as to whether or not same is satisfactory, and oblige.

Yours very truly,'

——— ———.

"The City authorities refused to finally pass the ordinance until Armour and Company filed the deed of dedication. The dedication deed was duly made and filed and the material portions of it are as follows:

'That whereas, Armour & Company has heretofore purchased from Clarence E. Linz and Ed. Tom Randle, certain property lying and being situated in the City of Dallas, County of Dallas and State of Texas, and being part of Block No. 250 in said City and located at the corner of Pacific Avenue and Harwood Street in said City, for the purpose of erecting thereon a building to be used in the conduct of its business in said City of Dallas, and at its request the Board of Commissioners of the City of Dallas has granted to the Texas & Pacific Railway Company a franchise to build and construct a switch track on the North side of Pacific Avenue between the West
129 line of Harwood Street and the East line of Live Oak Street, beginning at a point on said Pacific Avenue, 115 feet east of the east line of South Pacific and thence extending in an easterly direction 315 feet to the west line of Harwood Street, thence extending in a westerly direction, 225 feet from the point of intersection with the east of Live Oak Street, and which said track is to be so constructed for the purpose of providing switch facilities in connection with the property so purchased by Armour & Co. And whereas, as a consideration for the granting of said franchise it was provided in the ordinance aforesaid, that the said Armour & Co. should dedicate to the public use, 64 sq. ft. of land, located at the east point of said lot where the same forms a corner on Harwood St. and Pacific Ave., and should likewise dedicate to the public use for street purposes 35 sq. ft. off the northeast corner of said lot, where the same forms the

southwest corner of Harwood and Live Oak Streets, and it being the purpose of said dedication to round the corners at such points and to dedicate such property for street purposes and that such dedication should be made before the final acceptance of said ordinance by said Texas & Pacific Railway Company.

'Now, therefore, in consideration of $1.00 in hand paid, receipt of which is hereby acknowledged, and in further consideration of the granting of said franchise for such switch track to said Texas & Pacific Railway Company, for the use and benefit of Armour & Company, in thus providing such switch facilities to it, and in accordance with the provision referred to in said Sec. 4 of the ordinance aforesaid, the said Armour & Company a New Jersey corporation, has granted, sold and conveyed and by these presents does grant, sell and convey unto the said City of Dallas, a municipal corporation, of the County of Dallas of the State of Texas, for street and sidewalk purposes, all those certain lots, tracts and parcels of land described as follows to wit: same being situated in the said City of Dallas and County of Dallas, and being a part of Block No. 250 in said
130 City, and more particularly described as follows: (Here follows a description of the property dedicated.)'

"On July 12, 1912, acting for my firm, I wrote to J. W. Everman, General Manager, Texas & Pacific Railway Company, Dallas, Texas, the following letter, to wit:

'DEAR SIR:

In accordance with the promise of our Mr. Short to Mr. Fowler, we hand you herewith a certified copy of the ordinance as passed by the Dallas Commissioners for the Armour and Company's side tracks. The ordinance was finally passed on July 10th last, and under the provisions of the same the acceptance by your company must be filed within ten days from that time.

We presume that this will be attended to from your office, and we would be glad if you would advise us *with* the acceptance has been filed. If you desire that we do anything with reference to the filing of the acceptance, kindly so advise us.

Awaiting your further advices, we are

Yours very truly,'

——— ———.

"My firm in the due course received from J. W. Everman, General Manager, Texas & Pacific Railway Company, Dallas, Texas, a letter of date July 16, 1912, which reads as follows:

'GENTLEMEN:

Beg to acknowledge receipt of and to thank you for your letter of July 12th, enclosing certified copy of the ordinance as passed by the City Commissioners of Dallas granting this company the right to construct side track on the north side of Pacific Avenue in Dallas

between Harwood and Live Oak Streets, and we will arrange to go ahead on the construction of this track as soon as the necessary details are worked out.

Yours truly,

J. W. EVERMAN,
General Superintendent.'

131 "On July 26, 1912, acting for my firm, I wrote J. W. Everman, General Manager, the following letter:

'DEAR SIR:

Your favor of the 16th instant advising that in accordance with the ordinance granted by the City Commissioners of Dallas your company will arrange to go ahead with the construction of the Armour and Company switch track as soon as the necessary details are worked out, was received and we thank you for the same.

Merely that our records may be complete, will you please advise us whether or not your company has filed with the City of Dallas the acceptance of the ordinance, and if so, when the acceptance was filed.

Thanking you, we are

Yours very truly,'

——— ———.

"On August 2, 1912, acting for my firm, I wrote J. W. Everman, General Manager, the following letter:

'DEAR SIR:

Your favor of the 29th ult., advising that your company filed with the City Secretary of Dallas its acceptance of the ordinance for the Armour switch on July 18th last was received, and we thank you for the information.

Your very truly,'

——— ———.

(11) Plaintiffs put in evidence a duly certified copy of the joint petition of the Texas & Pacific Railway Company, Armour and Company, Almyra Hayes and Mary Hauch, of date April 19, 1912, addressed to the Hon. J. E. Lee, Street Commissioner, and the Honorable Board of Commissioners of the City of Dallas, for the granting of a franchise for a switch track to the lot in question.

132 (12) Plaintiffs put in evidence the report of J. E. Lee, the then Commissioner of Streets and Public Property of the City of Dallas, to the Mayor and Commissioners of the City of Dallas, on said joint petition of said Texas & Pacific Railway Company, Armour and Company, Almyra Hayes and Mary Hauck, and same reads as is set forth in paragraph 8 of their bill of complaint herein.

(13) Plaintiffs put in evidence a deed from Randle & Linz, the owners of the lot in question, dated June 27, 1912, conveying the

same to Armour and Company and proved the payment of the consideration of $50,000 therein recited.

(14) Plaintiffs put in evidence a duly certified copy of an ordinance of the City of Dallas, approved July 30, 1912, granting the Texas & Pacific Railway Company the right to construct a switch track to the lot in question to serve the plant of Armour and Company, of which Exhibit "C" to plaintiffs' bill of complaint herein is a true copy.

(15) Plaintiffs put in evidence a duly certified copy of an ordinance of the City of Dallas, approved May 30, 1902, granting to the Texas & Pacific Railway Company for twenty years thereafter the right to construct and operate a switch which makes out from the main line east of Preston Street and crosses Preston Street and continues west on Pacific Avenue to where the Fulton Bag & Cotton Mills plant is located.

(16) Plaintiffs put in evidence a letter of date March 20, 1918, written by Joe E. Lawther, then Mayor of the City of Dallas, to the Fulton Bag & Cotton Mills, which reads as follows:

"March 20, 1918.

The Fulton Bag & Cotton Mills, 125 No. Preston St., Dallas, Texas.

GENTLEMEN:

Confirming our conference this afternoon with reference
133 to the removal of the Texas & Pacific Tracks from Pacific Avenue, from Lamar Street to Preston Street, in the City of Dallas,—would state that it is agreeable to the City, to the Texas & Pacific Railroad, and to the Committee of Citizens interested in bringing about this improvement, that the switch connected with the main tracks of the Texas & Pacific Railroad now serving your plant, shall remain intact, as it now stands, to serve your plant for a period of five years, beginning January 1st, 1918,—this agreement to be entered into in some formal and binding manner, by all parties concerned, provided same is agreeable and acceptable to yourselves.

I would ask your careful consideration of this matter, and request your Company to notify me within the next few days, of your decision.

Yours very truly,
(Signed) JOE E. LAWTHER,
Mayor.

(17) Plaintiffs put in evidence a duly certified copy of the charter of the defendant the Wholesale District Trackage Company, of date April 3, 1918, showing that its capitalization is $200, contributed by eight subscribers in the sum of $25 each.

(18) For the purpose of showing, and for that purpose only, a subsequent attempted legislative action on the part of the City of Dallas, which if permitted to become effective plaintiffs maintain

will impair and destroy their rights in violation of the due process and contract clauses of the Constitution, plaintiffs put in evidence that certain resolution or ordinance of the Board of Commissioners of the City of Dallas, of August 23, 1918, which is set forth in extenso in paragraph 21 of their bill of complaint herein.

(19) Plaintiffs put in evidence duly certified copies of their respective charters, showing that they are duly incorporated as alleged by them in their bill of complaint herein.

134 (20) Plaintiffs put in evidence the lease contract between Armour and Company and Armour and Company of Texas, same being as is set forth by them in paragraph 15 of their bill of complaint herein.

(21) W. L. QUINN, a witness for plaintiffs, testified as follows: "My name is Wm. L. Quinn. I reside in Ft. Worth, Texas, and am superintendent for Bryce Building Company, and was such in 1912. I have before me the original contract for the construction of the Armour plant on the corner of Pacific Avenue and Harwood Street in the city of Dallas; also the drawings and specifications for that building, which I have examined. I superintended the erection of that building. It was started in the early part of August, 1912, and was finished in February, 1913. Armour and Company paid the Bryce Building Company something over $57,000 for the portion of the work done and the material furnished by it in the construction of that building. That building is concrete reinforced with steel. Both reinforcing and structural steel were used. It was designed for the exclusive use of the peculiar business of Armour and Company. It is almost monolithic in character. It is not adaptable to any other kind of business. The interior can not be taken out without very greatly impairing the strength of the exterior walls. The interior can be removed only by chiseling, and that would cost an enormous amount of money and time. The floors are all varying degrees. It has a basement extending over the entire area. In that building is installed a network of machinery and pipes. It has refrigerating vaults that are encased in cork and finished with white enameled tiling. The structure was designed to be and is a permanent one. On the ceilings are erected systematic networks of little inverted railroads with hangers down fastened to them on rollers. They take the meat and carry it around in the building to its
135 destination. The concrete foundation upon which the large engine was placed was put some three or four feet below the basement. It is a solid, reinforced concrete structure. No building suitable for the purpose of Armour and Company can be built without both the reinforced and structural steel, and, on account of war conditions and the requirements of the Government, it is problematical if steel can be obtained at all at any price. Such has been the advance in labor and material since this building was built that it would cost now 173% as against 100% to rebuild that plant, assuming the possibility of getting the materials."

(22) S. S. JEROME, a witness for plaintiffs, testified that for four years past he has not been in the employ of Armour and Company; that up to that time he had been in the service of Armour and Company thirty-five years as their General Land man. He came to Dallas and negotiated the conditional purchase of the lot in question. Prior to coming to Dallas he had known Mr. Everman, the General Manager of the Texas & Pacific Railway Company, and that he went to see Mr. Everman, and also the members of the City Council of the City of Dallas. That prior to the consummation of the purchase of the lot he took all of those gentlemen out to the lot to inspect the premises and the city officials assured him that they would grant an ordinance for a switch track to serve the property on condition that Armour and Company would dedicate certain portions of the lot to the city for street purposes. That Everman knew of the condition in the contract to purchase the lot and assured him that if the city granted the franchise the Texas & Pacific Railway Company would put in the switch and maintain and operate it; and that, acting upon these assurances, he on behalf of Armour and Company consummated the contract for the purchase of said lot, which he otherwise would not have done.

136 (23) FREDERICK E. TENNANT, a witness for plaintiffs, testified as follows: "My name is Frederick E. Tennant. I reside in Dallas and have resided there twenty years continuously. I have been in the employ of Armour and Company 19 years. Am Manager of the Dallas branch situated on the northwest corner of Pacific Avenue and Harwood Street. I have been the manager ever since the building on that lot was erected. I am thoroughly familiar with the structure of the plant. The main part of the building is reinforced concrete and the outside walls are placed against that concrete with fancy red brick. The floor and all partitions, and even the roof, is concrete reinforced with steel. It has a basement covering the entire area. The business conducted at that plant of Armour and Company is profitable. The annual volume of the business transacted there is approximately $2,000,000. The operation of that plant requires about 600 to 650 cars to be operated over the switch track serving the plant annually. That business can not be conducted at that plant in the event the switch track should be taken up because 50% of the business is fresh, perishable beef and mutton. The carcasses are handled on trolleys. The refrigerator cars are set at the dock which is cold and they are lifted onto the tracks and shot right into the other cold room, the beef coolers as we call them, leaving hardly a space of five minutes that the beef would be exposed in the open air. The temperature of the cars that come in are about 36 to 40, and the cooler runs from 32 to 36. We have an automatic device that controls the cold air in the beef coolers. When the meat arrives it is transferred immediately from refrigeration to refrigeration and that is very essential in the appearance and keeping qualities of the meat. The coolers in that building cover three floors and the basement. The beef cooler and pipe deck, which is just above

137 the beef cooler, the pipe deck as we call it, is also a storage room and is piped with cooling pipes running all through the building. The building is cooled with ammonia. The pipes extend even from the coolers down to the machinery and the basement, and it is quite an extensive piece of work. The switch track serving the Armour plant does not cross any street. It ends on the west side of Harwood Street and again on the east side of St. Paul. I am familiar with the plant of Fulton Bag & Cotton Mills and with the switch serving that plant, and with Preston Street which crosses Pacific Avenue. The switch serving Fulton Bag & Cotton Mills crosses Preston Street on which there is a double track electric street railway. Preston Street crosses Pacific Avenue and runs into Swiss Avenue. It is one of the principal thoroughfares crossing Pacific Avenue. Between Harwood Street and Preston Street, both crossing Pacific Avenue, the only streets you can tell are streets are Olive and Pearl. They are about 35 ft. wide. They have never been important thoroughfares."

138 Pacific Avenue is 80 ft. wide.

On cross-examination the said witness testified:

"We do not kill at the Dallas plant. We process there. We get our meat from all the killing plants that Armour and Company have. We market from Dallas to the adjacent territory by rail, auto trucks, wagons and any way they want to haul it. The Dallas territory extends 107 miles, that is to Big Sandy and Tyler. We have fourteen other plants in Texas like the one at Dallas but not as good. All of them are located on railroads with industry tracks. We have no other plant in Dallas besides the one in question and that is on the Texas & Pacific. We bring 75% of our raw material from Ft. Worth over the Texas & Pacific. Practically all of it comes over the Texas & Pacific. It could not come by any other road to reach our plant, or if it came in over other roads it would have to be switched on to the Texas & Pacific tracks. If the Texas & Pacific should raise its main line opposite the plant 14 ft. above the top of the rail we would have to raise the industry track, and if they lowered it 20 ft. we would have to lower the industry track and take the meat up on elevators through the cellar. I couldn't say that that would seriously impair the efficiency of the track. It would cost more to meet the change. As General Manager of the Dallas plant I am just connected with the selling end of it and had nothing to do with the making of contracts and the building of the buildings. The only processing we do at the Dallas branch is smoking and boiling hams. We have boiling vats there. They are half cured when we get them there."

(24) It was admitted that the Texas & Pacific Railway Company was placed in the hands of J. L. Lancaster and Pearl Wight as Receivers by the United States District Court for the Western District of Louisiana on October 27, 1916, and that said Receivers duly qualified; that on the 1st day of July, 1918, J. L. Lancaster

139 resigned as Receiver and Pearl Wight was appointed sole

Receiver, and the property of the Texas & Pacific Railway Company at this time is in charge of Pearl Wight as Receiver under said appointment; that said J. L. Lancaster became the Federal Manager of the Texas & Pacific Railway Company and other lines, and that the Texas & Pacific Railway Company is now and has been since January 1, 1918, under Federal control.

Plaintiffs rested.

Defendants' Evidence.

(25) Defendants put into evidence Article II, Section 1, subsection 1, of the Charter of the City of Dallas, 1907, which provides that the City of Dallas "* * * may condemn property for public use, within or without the City."

(26) Defendants put into evidence Article II, Section 2, subsection 2, of the Charter of the City of Dallas, 1907, which reads as follows:

"The City of Dallas shall have the power to enact and enforce ordinances necessary to protect health, life and property and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the City and its inhabitants; to protect the lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent either with the laws of the State of Texas, or inconsistent with the provisions of this act; and provided further, that the specification of particular powers herein authorized shall never be construed as a limitation upon the general powers herein granted, it being intended by this act to grant and bestow
140 upon the inhabitants of the City of Dallas full power of self-government, and it shall have and exercise all powers of municipal government not prohibited by this charter, or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas."

(27) Defendants put into evidence Article II, Section 7, subsection 2 of the Charter of the City of Dallas, 1907, which among other things, authorizes the City of Dallas:

"To acquire or own within or without the city limits, either by purchase, donation, bequest, or otherwise, all property it may need for any municipal purpose, whatever; and all necessary rights of way thereto, and shall also have the power to sell and dispose of the same, except as otherwise provided in this act."

(28) Defendants put into evidence Article II, Section 7, subsection 4, of the Charter of the City of Dallas, 1907, which reads as follows:

"To lay out, establish, open, alter, widen, lower, raise, extend, grade, narrow, care for, pave, supervise, maintain and improve streets, alleys, sidewalks, squares, parks, public places, and bridges, and to vacate and close the same; to sprinkle and care for the streets,

and to regulate the use thereof; and to require the removal from the streets and sidewalks of all obstructions, telegraph, telephone, street railway or other poles carrying electric wires, signs, fruit stands, show cases, and encroachments of every character upon said streets and sidewalks; and to vacate and close private ways."

(29) Defendants put into evidence Article X, Section 1, of the Charter of the City of Dallas, 1907, which reads as follows:

141 "The term 'Street Improvements' as embraced in this Article, shall include the improvement of any street, avenue, alley, highway, public place or square, or any portion thereof, within the city, by filling, grading, raising, macadamizing, re-macadamizing, paving, repairing or otherwise improving the same, or by construction or reconstruction of sidewalks, curbs, and gutters, or repairing the same; and shall also include the laying out, opening, narrowing, straightening, or otherwise establishing, defining and locating any street, avenue, public alley, square, place or sidewalk; and said term shall also include any other street improvement of a public nature and for a public benefit.

(*a*) The term 'Public Highway,' wherever used hereafter in this Article shall be deemed to include any street, avenue, alley, highway or public place or square, or any portion thereof, within the City of Dallas, dedicated to public use.

(*b*) The Board of Commissioners shall have power to order the improvements of any public highway or highways, or parts thereof, within the City of Dallas, and shall have power to prescribe the nature and extent of such improvements.

(*c*) Subject to the terms thereof, the cost of improving any public highways may be paid wholly by the City or partly by the City and partly by the owners of property benefited by such improvements and abutting upon the public highway, or portion thereof, ordered to be improved * * *

(*d*) The Board of Commissioners shall have power by resolution, to order the making of the public improvements mentioned in this Article, or any of them, by majority vote, and the passage of such resolution shall be conclusive of the public necessity therefor and the benefits thereof and no notice of such action by the Board of Commissioners shall be requisite to its validity. * * *"

142 (30) Defendants put into evidence Article XI, Section 5 of the Charter of the City of Dallas, 1907, in which, among other things, provided:

"The Board of Commissioners shall have the power to appropriate private property for public purposes whenever the Board of Commissioners of said City shall deem it necessary to take any private property either within or without the city limits for any of the following purposes, to wit: In order to open; change or widen any public streets, avenue or alley. * * *

* * * In estimating the damages to such property, the jury shall not only estimate the value of the land so taken, but they shall also estimate the damage done to the remainder of any land from which it is taken by reason of such taking and use. * * *

(31) Defendants put into evidence Articles 434, 435, 436, 437, and 438 of the Criminal Ordinances of the City of Dallas of April 10, 1911, which ordinances in substance, give the City of Dallas full authority to compel the railway companies to maintain watchmen and gates at intersection of the tracks of any railway company operating within the corporate limits of the City of Dallas with a public street, and providing penalties for failure to do so.

(32) Defendants put into evidence Chapter 9, Article 439, of the Criminal Ordinances of the City of Dallas, of April 10, 1911, which reads as follows:

"It shall be the duty of every railway company which has tracks in the City of Dallas to raise or lower the grades of the same whenever required so to do by the Board of Commissioners of the City of Dallas. In such case the Mayor shall give to such corporation at least thirty days' notice to begin the work of making such change
143 and the corporation shall have a reasonable time in which to make such change. Any corporation, its officers or agents or employes failing to comply with this article shall be deemed guilty of a misdemeanor and fined in any sum not exceeding one hundred dollars and each day's failure shall constitute a separate offense; and in addition thereto the City may perform the work of making such change and tax the expense thereof against the road of such corporation and institute suit therefor in any Court of competent jurisdiction."

(33) The defendant introduced into evidence an Act of the Fourth Called Session of the Thirty-Fifth Legislature of the State of Texas, approved March 22, 1918, permitting railroad companies to re-locate or abandon portion of line.

(34) Defendant put in evidence the recommendation of W. M. Holland, Mayor of the City of Dallas, of date, February 4, 1915, in the matter of preparing resolutions citing the Texas & Pacific Railway Company to appear before the Board of Commissioners to show cause why their track should not be lowered, elevated or removed from Pacific Avenue, which is as follows:

"Mayor's Office, February 4, 1915.

Honorable Board of Commissioners.

GENTLEMEN:

I recommend that the City Attorney be directed to prepare an ordinance putting into effect the Charter Amendment adopted in January 1914, giving the City of Dallas power to require railroad

companies to abolish crossings within the corporate limits, and being Article 2, Section 8, Sub-division 28-A of the Charter of the City of Dallas.

I further recommend that the City Attorney be directed to prepare a resolution citing the T. & P. Ry. Co. to appear before the Board of Commissioners on date named in resolution and show cause, if any it has, why said railroad company should not be required to
144 lower, elevate or remove its tracks on Pacific Avenue, between the West line of Austin Street and the East line of Parry Avenue, the resolution to provide that any interested property owner, as well as the railroad company, to have the right to appear and be heard.

The purchase by the Federal Government of the block of ground on Bryan Street North of the T. & P. Ry. as a location for the new Post Office makes it more necessary than ever that the grade crossings on Pacific Avenue should be eliminated.

Under existing conditions of traffic these grade crossings are dangerous. With the continued growth of the city it is only a question of time until some accident involving the loss of life occurs on them.

On pages 14 and 15 of his report on "A City Plan for Dallas," Mr. George E. Kessler made some detailed recommendations with reference to the elimination of grade crossings on Pacific Avenue and other streets, which are worthy of careful study.

Our City Engineer, Mr. J. M. Preston, was in the railroad service before entering municipal work. For the past two or three years he has been putting in his spare time in studying the problem of how best to eliminate all dangerous grade crossings within the corporate limits. I recommend that he be requested to prepare, within the next sixty days, a report to the Board of Commissioners embodying his views upon this important subject, he being requested in all plans or suggestions to work to the fullest utilization of the new Union Passenger Station.

In the granting of franchises to the Union Terminal Company it was expressly provided that the dangerous grade crossing at the West end of Commerce Street, where there will be twenty tracks, should be eliminated by the construction of an overhead approach to the Commerce Street Bridge, which structure is to be raised above the level of the railroad tracks.

145 The building of the Bowen Street Bridge and the paving of this street, which is now under way, will open to traffic a non-grade street crossing to North Dallas over a street which heretofore has been practically impassible to vehicles and pedestrians.

The Park Board now has its engineer at work making a topographical survey, and preparing plans for a non-grade crossing or subway under the tracks of the M. K. & T. Ry. at or near Maple Avenue. In connection with its use of the New Union Passenger Station it is understood that the M. K. & T. Ry. Company will apply for some additional franchise rights. In this connection it would not be unreasonable or oppressive to require the M. K. & T. Ry. Co. to

construct an overhead or underground crossing at or near Maple Avenue, in connection with such franchise rights as may be granted it.

A start having been made on the grade crossing problem, I hope to see our administration before its close begin proceedings to eliminate all of the dangerous grade crossings on Pacific Avenue, and to initiate work which will result ultimately in abolishing all dangerous grade crossings within the corporate limits.

The railroad companies to be affected should be approached and treated in a spirit of fairness and justice. In this connection I beg to reproduce a paragraph from my Annual Message of May 1, 1914, concerning grade crossings, which is as follows:

'To my mind the next big municipal problem is that of grade crossings. The completion of the Union Passenger Station will simplify this problem by detouring all passenger trains along the river front. No action should be taken by the City Government that will embarrass the financing or constructing of the Union Depot, but as soon as construction work is well under way the City should
146 take up in a comprehensive manner the question of eliminating grade crossings. The railroad companies affected should be given a full and fair hearing, and all ordinances providing for the abolition of grade crossings should grant the companies reasonable time to comply with their terms.'

Respectfully submitted,

(Signed) W. M. HOLLAND,
Mayor."

(35) Defendant put in evidence a resolution of the Board of Commissioners of the City of Dallas, approved March 15, 1915, which reads as follows:

"Whereas, by the provisions of the Charter and ordinances of the City of Dallas, power and authority is conferred upon the City of Dallas, to require any and all railroad companies operating any track or tracks upon or across any public street or streets in the City of Dallas to reduce such track or tracks below the level of the street or streets intersected or occupied by any such track or tracks or to elevate such track or tracks above the level of the street or streets intersected or occupied by such track or tracks, and to require the company or companies owning or operating such track or tracks to provide necessary proper crossings for the public travel at intersecting streets; and,

Whereas, the purchase by the Federal Government of the block of ground on Bryan Street, North of the Texas and Pacific Railway, as a location for the new Post Office makes it necessary that the grade crossing problem on Pacific Avenue be considered by the City Government and by our citizens, and

Whereas, the Board of Commissioners of the City of Dallas is desirous of investigating and ascertaining whether or not the tracks of the Texas & Pacific Railway Company along and upon Pacific Avenue, between the West line of Austin Street and the East line of

Parry Avenue, and across intersecting streets between said
147 points seriously interferes with the comfort, safety and convenience of the public, and whether or not a public necessity exists for requiring the Texas & Pacific Railway Company to reduce such tracks below the level of said Pacific Avenue and intersecting streets, or to remove said tracks therefrom, whichever in the judgment of the Board of Commissioners may be deemed best; and

Whereas, it is the desire of the Board of Commissioners to give to the said Texas & Pacific Railway Company and to all persons interested therein an opportunity to be heard with reference to said proposed changing of said tracks;

Now, therefore, be it resolved by the Board of Commissioners of the City of Dallas:

That the Texas & Pacific Railway Company be and it is hereby notified to be and appear before the Board of Commissioners in the Council Chamber of the Municipal Building in the City of Dallas at 2 o'clock P. M. on the 7th day of April, A. D. 1915, at which time and place the Board of Commissioners will fully investigate whether or not there is a public necessity for requiring the said Texas & Pacific Railway Company to elevate its tracks now maintained and operated on Pacific Avenue between the West line of Austin Street and the East line of Parry Avenue, and on intersecting streets, or to reduce said tracks below the level of said Pacific Avenue and intersecting streets, or to remove said tracks therefrom as may be deemed best after said hearing, and at which time and place the Texas & Pacific Railway Company may appear by its agents, officers and attorneys and a full and complete hearing shall be accorded to the said Texas and Pacific Railway Company and to all citizens interested therein as to whether or not a public necessity exists for the elevating, reducing or removal of said tracks now maintained on said Pacific Avenue.

148 That the City Secretary be and he is hereby instructed to cause this resolution to be printed in the Dallas Daily Times Herald for three days and to cause a copy of this resolution to be served upon the Texas and Pacific Railway Company by serving the same upon the proper officer of such company."

(36) Defendant put in evidence proof of service upon the Texas & Pacific Railway Company of the aforesaid resolution requiring it to appear and show cause on April 7, 1915, why its tracks should not be lowered, elevated or removed from Pacific Avenue.

(37) Defendant put into evidence report of J. M. Preston, City Engineer of the City of Dallas, to the Mayor and Board of
149 Commissioners of the City of Dallas, dated April 19, 1915, as follows:

"Dallas, Texas, April 19, 1915.

Honorable The Mayor and Board of Commissioners.

GENTLEMEN:

On February 4, 1915, the Honorable W. M. Holland, Mayor, recommended to your Honorable Body that the City Attorney be

instructed to prepare an ordinance putting into effect the Charter Amendments adopted in January, 1914, giving the City of Dallas the power to require railroad companies to lower grade crossings within the corporate limits, and that the same official be instructed to prepare a resolution citing the T. & P. Railroad Company to appear before the Board of Commissioners to show cause, if any it had, why said Railroad Company should not be required to lower, elevate or remove its tracks on Pacific Avenue between the west line of Austin Street and the east line of Parry Avenue.

Mr. Holland's recommendation also contained a paragraph in which he recommends that the City Engineer be requested to prepare a report to be presented to your Honorable Body, giving my views on this important subject within sixty days. Complying with your request I have the honor to herein submit the following for your consideration.

It must be apparent to all concerned that the separation of grades within the corporate limits of the City of Dallas is the largest and most important work that is now being considered by its people. It is evident to those who have studied the situation that without an exhaustive survey of the entire City with regard to this enormous improvement, it would be impossible for me to suggest to you an absolute correct rearrangement of the whole scheme within the short period of time I have been allowed to consider the matter, therefore, I am compelled to give my views only in a general way at this time.

150 The railroads to be considered are the M. K. & T. Railroad Company, The Cotton Belt Railroad Company, the Rock Island Railroad Company, the Brazos Valley Railroad Company, the T. & N. O. Railroad Company, the H. & T. C. Railroad Company, the Terminal Railroad Company, the Texas & Pacific Railroad Company, and the Santa Fe Railroad Company. The five first named railroads do not need very serious consideration because they are so well located that neither affect the City very materially in the matter of grade crossings.

The M. K. & T. R. R. Co., at present somewhat affects the traffic between the City proper and Oak Lawn and Highland Park. With the exception of Highland Park and vicinity, the grades can be separated very easily by under crossings, which have already been carried out to a certain extent, and plans are being further advanced for other under crossings.

The Cotton Belt, Rock Islnd, Brazos Valley, and the T. & N. O. Ry. Company's lines are almost entirely located along the river front, therefore, neither offer any serious hindrance to the traffic of the City.

The H. & T. Co. R. R. Co. can be very easily diverted by using the M. K. & T. tracks from the junction of Highland Park, and using the said M. K. & T. Railroad Company's tracks south and along the river front to a point near the Millers Ferry Bridge, and then a new line must be built to a connection with the main line somewhere near Metzger's dairy in southeast Dallas. This can be done at not an unreasonable expense by reason of the fact that this location will be

near the river bottom, and it will not increase the length of the railroad company's main line south to any considerable extent. I do not believe it is necessary for the freight depot of the H. & T. C. R. R. Company nor the Marilla Street Track to be maintained at their present location. With a proper rearrangement of the yards
151 south of Commerce Street a new location for the freight depot can be secured at a reasonable cost, and the roundhouse and shops can be maintained at their present location without the use of Marilla Street. This would, of course, mean that the H. & T. C. Ry. Co. must have full use of their present yards in East Dallas. For the present I do not consider it necessary to remove their yards outside of the City, however, the yard limits should not extend further north than Cadiz Street. The only street that will be to any extent affected by letting the present main line remain where it is south of Commerce Street are Grand Avenue, Park Row, South Boulevard and Forest Avenue. By the proper control of the freight traffic over this line, these avenues and boulevards can be kept open practically continuously, except by an occasional moving of a freight train. No train should ever be allowed to stop across one of these streets except in case of accident.

It is my opinion that by the purchase of two lots at each one of these street intersections it would remove practically all the danger that would be incurred by allowing this track to remain in its present location. The lots would be adjoining the railroad company's right of way, and on the near side of the railroad going east, and on the near side of the railroad going west. Everything that would obstruct the view should be removed from these lots, and they should be graded to the elevation of the present street grade, and they should be paved for a few feet parallel with the track, with no curb line at the sidewalk, to allow automobiles and vehicles to turn quickly to the right and avoid meeting a train in case one should suddenly appear. The rest of the lot could be beautified and kept absolutely free of all vehicles, and everything else that might obscure the view of the traffic.

Under the proper regulation in my opinion the Terminal Railroad Company's tracks will not be a serious drawback to the City in its present location for a good many years to come.

152 The T. & N. O. R. R. likewise is not very dangerous.

The Texas & Pacific and the Santa Fe R. R. Company's tracks present the most serious problem. It is my opinion that the Texas & Pacific R. R. Company can be disposed of best in the following manner:

Starting at Water Street approximately a minus 1.0 per cent grade could be made as far as Lamar Street, will give a subway at that point approximately 23 feet in depth. The subway could then be excavated parallel to the present grade line of Pacific Avenue east to a point where the H. & T. C. R. R. Company's main line track crosses Pacific Avenue. Except, of course, it will be necessary to gradually on a plus grade reach the surface of the ground somewhere about half-way between the Union Station and Walton Street. This point it seems to me is far enough east to maintain a subway for the pres-

ent time. As the City develops it might be necessary to continue same to some further point in the future. This subway should be excavated to the full width of Pacific Avenue, allowing space for adequate side tracks to serve all the buildings on Pacific Avenue and vicinity. It would be a very easy matter to connect said plant or buildings with the sub-way by elevators or subways underneath their buildings.

Between Water Street and Lamar Street overhead crossings will be necessary, but they can be had a minimum elevation above the present grade line of the street, therefore, creating the least possible damage to the adjoining property.

It is entirely feasible to operate the subway with engines using soft coal. Fan ventilators can be installed to eliminate the smoke and bad air.

This arrangement will be advantageous to the T. & P. R. R. Company in several ways. It will forever settle its location. It will pass, as now, through the heart of the City at no disadvantage, but on the contrary, to a decided advantage. There will be no inter-
153 secting streets to cut the side tracks; they can run continuously throughout the tunnel on both sides of the main line. The freight can be handled without bother, and altogether more satisfactory than at the present time. This tunnel will build up a very important wholesale, or a retail street, as the property owners may elect.

The advantage to the City will be another downtown street, the same in width as Elm, Main and Commerce Street- which is very much needed to relieve the congested traffic in this district. It will forever rid this street of the deadly grade crossings, and also give another downtown street without street car lines.

At the proper time the Santa Fe main line could be diverted south of the City. This would, of course, cause the bulidnig of a new line from a point near the crossing of this line with the Trinity River in a southerly direction for some considerable distance; thence eastwardly passing south of Oakland Cemetery, and near Wahhoo Lake, and thence to a connection with the main line near its crossing with White Rock. This line will probably be ¾ of a mile longer than the present main line, but taking everything into consideration I feel confident that the railroad trains can make better time and will absolutely lose nothing by the change. The Santa Fe yards in East Dallas in my opinion can be allowed to remain at their present location for many years to come, under proper regulation.

In all cases where railroad lines are allowed to remain at their present location the two vacant lots as described in the case of Grand Avenue, Park Row, South Boulevard, and Forest Avenue, in my opinion should be secured. This will be a great protection to the traffic at all times.

In conclusion I beg to state that there are two ways to dispose of the Texas & Pacific tracks on Pacific Avenue, namely, by a tunnel as described above, and the removal of the tracks entirely from

154 the street, and to locate the same entirely south of the City along the river front, and south of Oakland Cemetery, and thence eastwardly to a connection with the present main line near its crossing with White Rock Creek. This would mean the removal of all sidewalks and yards of the Company west of Parry Avenue. The removal of these tracks and yards entirely outside of the City of Dallas doubtless would cost less than the tunnel, but I doubt if it would be quite as satisfactory in the end to the City and to the railroad company.

An exhaustive survey and a complete summing up of all the costs and benefits pro and con must be made before the fact can be definitely determined.

If the Santa Fe Railroad Company and the Texas & Pacific Railroad Company remove their tracks and yards south of the City, it would follow that all of the other railroads passing directly through the City would have to do likewise. This would, of course, mean that enormous yards would have to be built in that vicinity. The ground is there, however, and the topography is suitable.

Yours very truly,

(Signed) J. M. PRESTON,
City Engineer."

Indorsed on back: Report of J. M. Preston, City Engineer. In Re: Abolishing Grade Crossings. April 28, 1915, Book 10, p. 319-20-21.

(38) Defendant put in evidence certified copies of resolutions of the Board of Commissioners of the City of Dallas showing that the Texas & Pacific Railway Company was cited to appear on April 7, 1915, at which time the Board of Commissioners would take testimony as to whether a public necessity existed requiring the said railway company to depress or elevate its tracks. On April 7, the hearing was continued to June 7, and on June 7 it was continued to June 30 and on June 30 it was continued indefinitely
155 without action.

(39) Defendant put in evidence a resolution adopted by the Board of Commissioners of the City of Dallas, April 30, 1908, requiring the railway company to station a watchman and to place gates at certain intersections of streets by railway companies entering the City of Dallas. The pertinent portion of said resolution reads as follows:

"That the Texas & Pacific Railway Co. be and they are hereby directed to place watchmen at the following places:

At the intersections of Market Street, Lamar Street, Griffin Street, Akard Street, Ervay Street and the 5 points where Masten, Live Oak and St. Paul Streets run into and cross the tracks of the Texas & Pacific Railway Company; and at Harwood Street, Preston Street, Hawkins Street, Good Street, Duncan Street, Walton Street and Armstrong Avenue.

That the Texas & Pacific Railway Company be and they are hereby

directed and required to place gates at the following places: Lamar Street and the Texas & Pacific Ry.; Akard Street and the Texas & Pacific Ry.; Ervay Street and the Texas & Pacific Railway. At the 5 points where Masten, Live Oak Street and St. Paul Street intersect with said Texas & Pacific Ry. Co., and at Walton Street and the Texas & Pacific Ry. intersection.

Be it further resolved that the proper officer be directed to send the proper notice to the agent or representative of each of the above railway companies, notifying them of the passage of this resolution, and directing said railway companies to place said gates and watchmen at each of the places above mentioned."

(40) Defendant put in evidence a petition filed by the Texas & Pacific Railway Company and J. L. Lancaster and Pearl
156 Wight, Receivers of said railway company, on March 12, 1918, to the Railroad Commission of Texas for permission to remove its tracks from Pacific Avenue in the City of Dallas between Griffin and Preston Streets, the substance of said petition being as follows:

The Texas & Pacific Railway Company and J. L. Lancaster and Pearl Wight, Receivers of its railroad and other property under appointment of the United States District Court of the Western District of Louisiana, collectively referred to herein as petitioner, pray for permission to remove certain trackage in the City of Dallas and make certain re-arrangements in its trackage and readjustment in its service facilities in the said City as follows:

1. Petitioner prays for permission to remove all of its tracks for all purposes from Pacific Avenue in said City of Dallas, between Griffin Street and Harwood Street; and to rearrange its tracks on Pacific Avenue between Harwood Street and the Houston & Texas Central Railway crossing by the elimination of its two main line tracks and the substitution therefor of industry tracks extending on each side of Pacific Avenue; and to re-arrange its tracks in Pacific Avenue between Lamar Street and the west line of Griffin Street, all of said trackage being shown on blue print hereto attached and marked Exhibit "A."

2. In this connection petitioner shows that in lieu of the service to shippers now provided on Pacific Avenue and for the extensive increase in such service, it is planned that tracks shall be built into a new business and industrial district in Dallas as shown in plat hereto attached marked Exhibit "B."

3. Your petitioner further shows that the readjustment desired does not involve any change in its freight depots nor in the service to shippers therefrom. The old passenger station, located between Lamar and Griffin Streets is not now being used as a passenger station,
157 its use having been abandoned since the completion and use of the Union Station at Dallas. Petitioner further shows that the use of the passenger station at the corner of Pacific and Central Avenues in Dallas has been greatly curtailed since the completion and use of the Union Station and in the event the tracks are removed

from Pacific Avenue, its use will probably be abandoned as a passenger station.

4. Petitioner further shows that under present conditions due largely to the growth of the City of Dallas, the maintenance and operation of its present tracks on Pacific Avenue within the limits above described is expensive and unsatisfactory from an operating standpoint and will become more so in the future. Petitioner is occupying said street with its main line tracks under a franchise which by its terms has yet twenty-three years to run. After the expiration of the term of its franchise, the rights of petitioner on said street will be more or less uncertain and if the tracks are to be removed from Pacific Avenue, the longer the removal is delayed, the more expensive will it become to provide other means of operating petitioner's trains into and thru the City of Dallas, due to the growth of the City and the consequent increased values of property.

5. Petitioner further shows that Pacific Avenue within the limits above defined is for the entire distance parallel with and only one block removed from Elm Street, which is one of the three principal business streets of the City of Dallas; that said Pacific Avenue within said limits is practically in the center of the City and that within said limits are crossings of several streets of great traffic as well as other streets of growing importance. For several years efforts have been made by the municipal authorities of Dallas to work out some plan for the separation of the grades on Pacific Avenue or the entire elimination of the tracks. The lowering of the railroad
158 tracks below the street grade or the elevation of the railroad tracks above the street grade have features objectionable to the City and the property owners and the present plan for the entire elimination of the tracks appears to be the only plan upon which an agreement can be reached between all interested parties.

6. Petitioner further shows that in lieu of the present route for its trains into and through Dallas via Pacific Avenue, another route will be provided. The new route will provide adequate facilities for the trains of petitioner, and will only increase the main line trackage about two and three quarter miles.

7. Petitioner further shows that the order desired is to be permissive only as the changes contemplated depend upon many details that are yet to be worked out and upon the action of the City of Dallas and certain committees of business men of the City of Dallas who are undertaking to furnish petitioner with additional facilities shown in Exhibit "B," as well as upon other contingencies. Petitioner, therefore, prays that your Honorable Body by proper order give its consent and permission to make the changes herein outlined."

(41) Defendant put in evidence an order of the Railroad Commission of Texas, of date March 15, 1918, which is as follows:

Office of Railroad Commission of Texas.

"No. 23.

Austin, Texas, March 15, 1918.

In re Application of the Texas & Pacific Railway Company and the Receivers Thereof et als. for Authority to Remove and Relocate Certain Tracks within the City of Dallas, Texas.

Cause No. 1910.

Whereas, on the 4th day of March, 1918, the Texas & Pacific Railway Company and J. L. Lancaster and Pearl Wight, Receivers thereof, filed with this Commission their application in due form praying that the Commission enter its order approving and
159 granting authority for, the proposed removal and re-location of certain railway tracks within the City of Dallas, Texas,—said application having been duly filed and set down for hearing by the Commission for the 12th day of March, 1918, due notice of the filing of such application and the setting of the same for hearing was in due time and manner given to all interested parties;

Whereas, on the 12th day of March, 1918, said cause and application in due order came on for hearing and came said petitioners, and all other parties caring to appear, and announced ready therefor, and said cause and application, as well as all opposition thereunto, were duly heard; and the Commission having heard the evidence and argument offered by all parties, thereupon took the cause and application, and the opposition thereunto, under advisement,—and having fully considered the same,—

Now on this the 15th day of March, 1918, finds the following facts:

1. That the removal of the tracks of the petitioners now located upon Pacific Avenue, between Preston Street and Griffin Street, in the City of Dallas, Texas, and the relocation of the same and the roadbed of their line in the vicinity of said locality and the re-arrangement of their tracks on said Avenue, between Lamar Street and the west line of Griffin Street, will have the effect of reducing the grades of their lines within said city and will serve the public interests by promoting the public safety and convenience;

Therefore, pursuant to authority vested in it by law;

1. It is ordered, adjudged and decreed by the Railroad Commission of Texas that the Texas & Pacific Railway Company and J. L. Lancaster and Pearl Wight, Receivers thereof, be and they are hereby authorized and permitted to abandon and remove the railroad tracks now located upon Pacific Avenue in the City of Dallas, Texas, between Preston Street and Griffin Street, and to abandon,
160 change and rearrange the tracks on said Pacific Avenue between Griffin Street and Lamar Street, by substituting there-

for tracks alongside of and substantially parallel with its freight depot, lying on the north side of Pacific Avenue, between Griffin Street and Lamar Street, and to re-locate its other tracks as shown in the prayer of its petition and the exhibits and proofs submitted at the hearing hereof, which are hereby referred to and made a part hereof.

2. It is further ordered, adjudged and decreed that the Commission, being without jurisdiction to determine the claims of the Gulf, Colorado & Santa Fe Railway Company as to existence of a contract between that company and the Texas & Pacific Railway Company, and as to the existence of a franchise grant to that company by the City of Dallas, the prayers of that Company as to such matters are dismissed without prejudice, the Commission anticipating that such claims, if valid, will be adjusted to the satisfaction of that Company and the other parties concerned."

(42) J. L. Lancaster, a witness for the defendant, testified:

"My name is John L. Lancaster. In March 1915, I was Assistant to the First Vice-President of the Texas & Pacific Railway Company. In March 1916, I was elected First Vice-President and in the succeeding March or April I was elected President of the Texas & Pacific Railway Company. Subsequently, on October 26, 1915, I was, in connection with Pearl Wight, appointed Receiver and acted in that capacity until July of 1918, at which time I went with the property as Federal Manager.

One of the things that came to my attention after coming on the property in March, 1915, was the agitation for the elimination of the tracks on Pacific Avenue in Dallas. In the fall of 1915, the city employed Mr. George Kessler, a celebrated engineer, to make a survey of the terminals and boulevards of the city and recommend a rearrangement of both the terminals and the city's boulevards and park system. In that recommendation, he proposed the elimination of a great many tracks within the city, including the tracks of the Texas and Pacific on Pacific Avenue. The city then employed Mr. John F. Wallace, an eminent engineer, at one time Chief Engineer of the Panama Canal, to prepare plans for the removal of the grade crossings and the objectionable tracks within the congested parts of the city. Mr. Wallace made a voluminous report. When I say "various tracks" I do not confine that alone to the Texas & Pacific, while the Texas & Pacific's were principally the tracks that were crossed by the travel between the residential and the business sections of the city. Following those reports, which were made some time during either the early fall or the late fall of 1915, the Texas & Pacific joined the other railroads in making an investigation to determine the best means of meeting the demands of the city. Nothing was done until the Spring of 1916, about the time that I was elected Vice-President of the Company. At his request, I met Mayor Lindsley in Dallas, and he insisted that the tracks on Pacific Avenue be removed, that we build a belt line around the city. I ex-

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plained to Mayor Lindsley that our great objection to abandoning our tracks on Pacific Avenue and the use of a belt line around the city was that we would forfeit the benefits of the industrial situation, or the industrial advantage that we had in Dallas. I pointed out to him that many industrials had grown up along our track that were of very great value in securing traffic; that if we should build around the city, it would be like a new line to Dallas and would forfeit the benefits of having been a part of Dallas and grown up with Dallas through these many years. I conferred with our counsel and they explained to me that the city might require the elimination of grade crossings and make police regulations, and that it might require, if it was a reasonable engineering possibility, the raising
162 or lowering of our tracks. I explained this viewpoint to the Mayor, and worked, at his suggestion, to prepare plans for the elevation of the Texas & Pacific tracks between Griffin Street and the H. & T. C. crossing. The approach between Griffin Street to this elevated track would have begun at Trinity River, as it was necessary to preserve our connection with the Union Passenger Station, and therefore we couldn't lift our tracks beyond possible connection with those tracks, with the tracks of the Union Station in the vicinity of Trinity River. I submitted these plans to the Mayor, and, at his suggestion, submitted them in turn to Mr. Wallace, who approved them, although, in his previous report, he had indicated that the elevation of these tracks wouldn't be satisfactory. An estimate was made of the cost of elevating the tracks on Pacific Avenue, and, as I recall it, it amounted to something in excess of two and a half million dollars, as the elevation of the tracks between Griffin Street and the H. & T. C. crossing. At that point, in the procedure, I laid the matter before the Board of Directors of the Texas & Pacific Railroad and explained to them just what we might be required to do and the cost of doing the work, and the Board didn't approve it for the reason that I was unable to tell them where we were to get the money, and on my return to New Orleans from New York, I had a conference with the president of the Southern Pacific Lines, known as the Sunset-Central Lines, and out of that conference there grew an agreement, a verbal agreement, with the Houston & Texas Central Railroad to build a belt line around the City of Dallas, from a connection with the tracks of the Dallas Union Terminal Company to the connection with the tracks of the Texas & Pacific and East Dallas; that the Texas & Pacific would be given the right to use those tracks for an unlimited period, a perpetual right, by the payment of three per cent on the cost of constructing the lines and the cost of its maintenance and operation in proportion to the business done by the Texas & Pacific as
163 compared with the total amount of business handled over the line. On the other hand, the Texas & Pacific was to give the H. & T. C. the right to use its line between Dallas and Fort Worth on exactly the same basis. This agreement solved the problem so far as the City of Dallas was concerned in that it found a way around the City of Dallas without the necessity of building a line and without the necessity of financing or raising funds for that purpose. This is

the contract, Exhibit B to Receivers' Application, by which the Texas & Pacific would use the tracks of the H. & T. C., and there is a draft of a similar contract in existence by which they would use the Texas & Pacific lines. About the time of the conference I had with Mr. Scott in January I think of 1916, there was a lot of newspaper discussion and several mass meetings for the purpose of discussing the proposition of elevating the Texas & Pacific tracks on Pacific Avenue. Mayor Lindsley sent for me and told me that the plan couldn't be carried out, that the opposition was so great that he wouldn't take it, and he again told me that some plan must be found to remove the tracks entirely from Pacific Avenue, between Griffin Street and Preston Street, I think, at that time. I then again pointed out the value of the tracks in that territory for industrial purposes, and he told me then that if we would consider the removal of the tracks on Pacific Avenue the city would provide an industrial district of much greater magnitude, and a right of way through which the city would cause to be turned over to the railroad company. I told him that that met our objections and if the city would cause such plan to be carried out we would remove our tracks. Thereupon he published in the Dallas papers the whole scheme, showing a large industrial district lying between Akard and Lamar Streets and extending from Pacific Avenue, practically five or six blocks further north. The Mayor was unwilling to proceed in any other way so that everybody might know just what was to be undertaken. This is the published plan that I am referring to.

164 "We finally agreed that if the city would provide this industrial district with right of way through it to the Texas & Pacific, we would find a way around the City of Dallas and remove our tracks on Pacific Avenue. Just at that time the Gulf, Colorado and Santa Fe Railroad had acquired the right to use the Texas & Pacific tracks on Pacific Avenue. In my negotiations with the City I pointed that out, and the City undertook themselves to negotiate with the Santa Fe for its abandonment of their right. I then laid the whole matter before the Board of Directors, and secured their consent to the arrangement, and the citizens formed a committee to carry out the acquisition of the right of way through the new industrial territory, and I, in turn, prepared and submitted to Mr. Scott, the president of the H. & T. C. Railroad, draft of the contract for the use of its line. The citizens committee was unable to carry out the plan first agreed upon, and after several modifications, we agreed to accept the plan that they found themselves able to carry out, and after several conferences covering probably a year's time, we seeking to get all we could, the citizens seeking to get our acceptance of what they could furnish, we arrived at an agreement which is formulated in a contract and has been signed by the City of Dallas and by the citizens' committee, which has been incorporated into and is known as the Wholesale District Trackage Company. This is the contract that I refer to. Here contract was put in evidence being the same as Exhibit D to the plaintiffs' bill of complaint herein.

As Vice-President of the Texas & Pacific Railway Company, I considered that the making of the arrangement as outlined—a most advantageous one to the railroad company, because, through an intimate knowledge of the operating conditions, I felt that ultimately, and unless possibly the railroad should abandon the operation of its trains on Pacific Avenue—the grade line on Pacific Avenue ascends eastward at the rate of 1.4 feet per 100 feet; now, to get our heavy trains over that grade, they are required to run at an excessive
165 rate of speed, and at the foot of the grade there are whole thoroughfares crossing Pacific Avenue, and besides Pacific Avenue is used longitudinally by teams, automobiles and so forth—the Texas & Pacific traffic on that thoroughfare is quite heavy—I think the average trains operated each twenty-four hours would be in excess of a hundred—the trains now operated, the freight trains, are very long, the longest among them may have seventy to eighty cars, and the westbound approaches, the interlocking plant near the Trinity River there, they are frequently stopped, and the obstruction to the traffic is very great. I have seen as many as fifty vehicles on each side of Akard Street, waiting for the train to proceed, and it had only stopped there for two or three minutes. The switch service is heavy as the yards of the Texas & Pacific are east of the H. & T. C. crossing and there are many industrials on Pacific Avenue; there are very large industrials west of Dallas which are switched by switch engines operating in Dallas, and thus the movement of these switch engines is constantly working on that street almost constantly day and night. There are two street car lines across the tracks between Preston and Griffin Street-, they are very busy tracks and I have always felt that they introduced a very great hazard to public safety. The trains coming down the hill make practically no noise, and going up the hill they must run at an excessive rate of speed in order to get over the summit in the vicinity of the H. & T. C. crossing. Pacific Avenue divides the principal resident section from the business section; it is only one block removed from probably the most used thoroughfare in the city, Elm Street. The trains going up the hill make a very great noise, and I just felt that the public wouldn't continue to stand the constant interruption to traffic and the noise of the locomotives, so I felt that in the interest of public safety we should remove our tracks. I felt that in the interest of economical operation we should remove our tracks because if we should
166 strike a loaded street car we should probably kill a great many people, and the expense from accidents on Pacific Avenue was growing, so from the viewpoint of economy, the saving of these expensive accidents, we should be justified in removing our tracks; so I felt that the contract with the H. & T. C. for the use of their line was a most excellent one for the Texas & Pacific in that, out of that trade the Texas & Pacific would get a revenue, and the amount to be paid by the H. & T. C. would very greatly exceed the amount we would have to pay the H. & T. C. for the use of their line. The Texas & Pacific didn't have the money to build its own line around the city so I felt then, and I do now, that it is a most advantageous thing for the Texas & Pacific to carry out the programme,

which is for the H. & T. C. to build the line and abandon the use of the tracks on Pacific Avenue. I regard it as a rare opportunity to get out of a very bad situation.

The lowering of the grade was impossible because of the high water mark of the Trinity River. We cannot lower our grade at Trinity River, you can't drain the subway. The elevation of the tracks would, of course, destroy to a large extent the possibility of serving industries; they would have to be served on the second floor, you couldn't pitch that grade line to strike the existing floor, and they would have to rearrange the height of their storage. In those figures of two and a half million dollars there is nothing estimated for damages to abutting property, and it was our intention at that time that the city would arrange and care for such damages.

167 "If the grade had been raised, or if we had gone overhead, there would have still been the noise and smoke and dust from the trains. The population of the City of Dallas is about 160,000. The various thoroughfares crossing our track on Pacific Avenue feed from the active business center to the active residential portion of the city. There is a business area looking to the north of our tracks of considerable magnitude, but not nearly so important as that looking south. Pacific Avenue divides Dallas North and South, and extends east and west. The volume of traffic is very heavy across Pacific Avenue both north and south, and besides Pacific Avenue is used extensively longitudinally. Pacific Avenue proper is used extensively for traffic both east and west.

I did not have any real estate scheme or any conspiracy in my mind, for personal purposes, or real estate purposes, when I negotiated these various discussions with the Mayor and adopted the contract. I consider the contract, under the conditions which I have detailed, as a very provident one and one that should be made by the Receiver. The serious objection to lowering the grade was that it was almost impracticable *for* the fact that the Trinity River is crossed by the Texas & Pacific just below Griffin Street, the west end of Pacific Avenue, and that at its flood height the river would be higher than the level of our track when lowered and would flood the subway. There is no other very great objection. The one regarding the Trinity River is unsurmountable; that is a very great objection to the operation of trains through such a long tunnel, the objection being from smoke to passengers on our train and smoke arising and sifting into the tunnel proper. I am an engineer and have been engaged in the construction of engines and tunnels, and I am thoroughly familiar with the effect of water rising beyond the level of a body without any obstruction, that it will seek its own level and run in. I have not the data as to the high water level of the river at this time, but it gets within

168 I should say ten feet, as I recall it, of the present grade line of our tracks and, of course, if our tracks on Pacific Avenue be lowered about 25 feet, you would have 15 feet of water at flood time on our subway. Those figures are approximate, as I recall them, from investigation made at the early stages of the consideration of the matter.

I would have been perfectly willing not to have had our tracks disturbed on Pacific Avenue, and the only reason I entered into those negotiations that led up to this proposed form of contract was the fact that I felt that it would be extremely expensive to us to have our grade or separation of grades between the crossing and the street, and the company didn't have the funds to provide for doing it and had no way of getting it. I never at any time voluntarily solicited the city to let us move the tracks or indicated any active desire to move them. The pressure was entirely on the part of the city, and through various police regulations that would make the operation of trains impossible; among them, we would have to stop at each crossing and proceed under flag. That, of course, would be tantamount to prevention of operation. I refer to the present ordinance limiting our rate of speed, say to six miles an hour. With our present grade line we can't pull our average freight train up that summit at that rate. At the top the average of six miles is all right, but at the bottom it is considerably in excess of that. The city threatened to enforce such ordinance, it already had it passed; also threatened to insist on our placing gates at each crossing. When the Government took over the railroads in February, 1918, the whole scheme was placed before the Assistant Director General in Washington, and before Mr. Aishton, who, at that date, was Regional Director, at which hearings were had and the Administration authorized that it be proceeded with. We had our representative at the hearing before Mr. Aishton, in Chicago, and the Director General authorized the carrying out
169 of the arrangement I have outlined. This is the telegram from the Director General. It was put in evidence and is as follows:

'February 25, 1918.

Mayor of the City of Dallas, Dallas Texas:

I hereby assent to the Texas and Pacific and the Southern Pacific making the necessary expenditures as pointed out in your interview with Mr. —— ——, to enable the Texas and Pacific to remove its tracks from Pacific Avenue for a distance of one mile. I understand that the Gulf, Colorado and Santa Fe claims that it has a franchise from the city and a contract with the Texas and Pacific, both of which will be violated by the removal of the tracks mentioned. This is a matter over which I have no jurisdiction, but if that company's claim is well founded, I urge that everything reasonably practicable be done to provide that company with some reasonable alternative route. I shall be glad to co-operate to that end. Necessary advise and instructions to Texas & Pacific and Southern Pacific Railway relative to plans above referred to will be given through Regional Director Aishton. Will you please deliver copy of this telegram to receivers of Texas and Pacific and also to Mr. Edwin B. ——, Chairman of the Opposition Committee.

(Signed) WILLIAM G. McADOO,
Director of Railroads.'

I began my engineering experience with little or no education, as a rodman on the Illinois Central in 1888. I was employed in various capacities, from a rodman to an engineer in charge of work between that time and 1905. I have had large experience in various kinds of railway construction. I have had to do with the construction of large or extensive railway yards. I was connected with the design and construction of the depot and yard of the Missouri Pacific at East St. Louis. I was engaged in the rearrangement of various yards and terminals on the Chesapeake & Ohio. I
170 built and rearranged the yards of the Memphis Union Terminal Company at Memphis, and of the Union Railway there. In fact, for the last fifteen years, for the latter fifteen years of my experience, I was engaged in railway work and in the maintenance and construction of tracks and yards. Yes, I am familiar with the proposed plans that were suggested by Mr. Preston with reference to the tunnel on Pacific Avenue. I read Mr. Preston's report, and I have discussed the feasibility of it with the Engineering Department of the Texas & Pacific Railway.

From the standpoint of an Engineer and in the light of my experience, I would say the principal objection to the subway is that it would prevent service to industries located on the Texas & Pacific Railroad between the Trinity River and a point a mile east, about a mile east of the Houston & Texas Central crossing. It would be enormously expensive. Its operation would be attended by great inconvenience to passengers. It would render difficult the operation of its freight trains, and the floor of the tunnel proposed by Mr. Preston would be about twelve feet below the high water mark of the Trinity River, thereby preventing its being drained except at the cost of pumping the water out with machinery. That pumping arrangement would be very expensive. You have to handle the storm water of the City that intersects Pacific Avenue during flood tide or flood time of the Trinity River. That would require a very large expense. The water would get into the tunnel from two sources: from the seepage from the river itself, and from the storm water drainage of the City. It would flow into the territory occupied now by Pacific Avenue. Pacific Avenue was originally a drain. The records show that it was in the beginning a large gully—the profiles indicate that—and it is a natural flow of a large amount of drainage, and so of course would be taken into this tunnel. There is no way to get it out again unless you pumped it out.

171 "The plan proposed of having sidetracks or industry tracks on the north and south side there so as to accommodate warehouse property, trackage property on either side of Pacific Avenue, would not be a practical railroad proposition. The expense involved would be greater than would be justified in the location of the building to be served by the trackage. You could go other places and be served by trackage at very much less expense.

The subway would have to be lighted. It would have to be lighted and ventilated. Ventilating would be the most difficult. There is a tunnel under the City of St. Louis used by all or a large number of trains from the east side of the river entering St. Louis,

and the smoke nuisance is very bad. That tunnel is used for trains passing between the bridge and the Union Station, between the industrial on the east side and the industrial on the west side of St. Louis. I do not know any plan of subway on this order as an industrial proposition. I do not think there are any used for that purpose. The New York Central tracks pass under what is supposed to be the very busiest part of New York, but there are no industrial tracks leading off of those main thoroughfares."

On cross-examination the witness testified as follows:

"There are several competing lines of railway between Fort Worth and Dallas. Armour and Company could get all the freight it wanted from Fort Worth without using the T. & P. at all. Pacific Avenue is 80 feet wide. We have a watchman at these crossings. They were there when I first came to the property. I couldn't say that in the last three years we have had fewer accidents and less people hurt at crossings on Pacific Avenue than at country crossings. I couldn't say that we have accidents more frequently at country crossings than on Pacific Avenue. Yes, we did kill some people in the country just south of the Fair Grounds crossing in the
172 last few weeks. We have very few watchmen at country crossings. We have had a great number of serious personal injury cases in Dallas in years gone by and since my connection. I couldn't say that in the last few years it has been less than ever. Yes, we have a man that knows, Mr. Buescher. He is in Dallas and I presume his record was filed there. I did not bring it with me. Yes, it is true that the Texas & Pacific Railway Company was cited by the Board of Commissioners to appear before it on the 7th day of April, 1915; it was stated that the Commissioners would then take testimony and determine whether a public necessity existed or not for action. It is true the Railway Company filed no formal answer, pleading or anything else in response to that citation. I think, as a matter of fact, on April 7, the hearing was adjourned till June 7; I heard it stated here before. And I think on June 7 the hearing was adjourned till June 30. It is my recollection that on June 30 it was indefinitely passed. I don't know whether the Board of Commissioners of the City of Dallas took any corporate action whatever against the Texas & Pacific Railway Company, relative to the removal of its tracks, the lowering of its tracks, or the elevation of its tracks, from that time it indefinitely passed over that hearing till August 23, 1918.

Yes, as a matter of fact, what was contemplated to be done is absolutely the result of contract, on which, under the circumstances, I deem advantageous to the railway company. My conferences were with Lindsley when he was Mayor but I did not know that he was president and principal stockholder in the Central Real Estate Company. No, I did not know that Mayor Lindsley had sold a block of ground just north of the Texas Pacific tracks to the United States Government for $250,000. I knew the Government had bought some land there, but that is as far as my knowledge goes. I did not

know, and I don't know it yet, that they bought it from Mr. Lindsley. No, I don't know that Lindsley's corporation after
173 that transaction had acquired title to, or options upon, some eight hundred thousand dollars' worth of property in that vicinity near the new Post Office site, and that the main object was to get these tracks out of the way for the development of that business district. I don't know that every property owner expected to be benefited financially by this move. I can't tell who they were, but I do not know where the holdings are; I didn't know they had any. I was not in Dallas in 1908 when the Trinity River was higher than ever had been known in its history, and I don't know anything about the statement that even at that time it didn't approach within three blocks of where the subway would begin as contemplated. I do not remember how many more grade crossings we were putting in than we were proposing to take out by this new scheme. Those grade crossings we put in will only be crossings for switching purposes, crossing minor highways. I don't think there will be a grade crossing on that belt line from Dallas to Corsicana. The belt line has not been built yet but it is contemplated. Mr. Mitchell, the chief engineer of our railway, has no connection with the belt line. The H. & T. C. is to build it and Mr. Scott has told me repeatedly that there is to be no grade crossings on it. Yes, they are going to use a part of the old Rock Island; that is to be raised. I am not advised that it is a grade crossing from Dallas to Corsicana; I have been over that property but I don't recall the road you speak of. I am not familiar with the roads that you speak of that lead from Dallas to Kaufman, except that I do know that the agreement with Mr. Scott and myself was that he would construct the line free from grade crossings. He stated that repeatedly, he stated it in the conferences and he stated it to me.

174 "On that map we put in fifteen crossings where there are none now, and three tracks at nearly all of the crossings. Lamar Street is one of the principal thoroughfares of the City of Dallas. Instead of taking out any crossings we put in three additional ones, but there will be no through trains operated through that district, but when the industrial district is established there will be freights and movement by switch engines. Yes, it is as bad to be killed with a switch engine as with a through passenger engine. I received the following letter from Mr. Hinds, writing for Armour and Company:

'CHICAGO, ILLINOIS, January 22nd, 1918.

Mr. J. L. Lancaster, Receiver, Texas & Pacific Ry., New Orleans, La.

DEAR SIR:

We understand that there is again some agitation with regard to eliminating the railroad track upon Pacific Avenue in Dallas, Texas. Such action would ruin our investment on your rails and we have no doubt, would be a serious damage to your company.

No doubt, you are already informed of this and have the matter

in hand, but will appreciate your advice in the matter at your early convenience.

Yours truly,

(Signed) ARMOUR AND COMPANY,
E. P. HINDS.'

C. W. G.

I replied to that letter as follows:

'NEW ORLEANS, January 25, 1918.

Mr. E. P. Hinds, Armour & Company, Union Stock Yards, Chicago, Ill.

DEAR SIR:

This will acknowledge receipt of your letter of January 22nd, file E-808-235-A, concerning elimination of tracks on Pacific Avenue, Dallas, Texas.

175 'There has, as you know, been agitation pro and con concerning the removal of tracks on Pacific Avenue. This entire subject is brought about through the agitation of certain interests in Dallas and have no means of knowing what the result will be, nor could I anticipate just what tracks would be removed in case some arrangement was perfected by which we would be required to vacate Pacific Avenue. It would seem to me that the City would be obligated morally at least to protect your interest in case action was taken which would damage your property.

Yours truly,

(Signed) J. L. LANCASTER,
Receiver.'

It is not true that conditions in Dallas with reference to Pacific Avenue and with reference to the tracks thereon have remained constant, with the exception of an increase of population in the city and an increase in the volume of traffic of the railway company. The situation has changed materially with the introduction of the heavier power on the Texas & Pacific railroad, thereby handling longer trains than it formerly did, but that is not the only exception to the conditions remaining constant since that time. As business increases on the railroad, and the use of the highway increases, the conditions change. As the city grows, incident to the location of a railway, the traffic on the streets becomes more congested. No, the very object and purpose of locating a railroad in a city is not to increase its population. The purpose of locating a railroad in a city is to derive the benefit from the increase, I should say. When we have now a westbound car of freight, say, for the Fulton Bag & Cotton Mills—eastbound, I should say, coming from the west, we have to haul it about a mile I should say, from Trinity River to the Fulton Bag plant. On this belt line it would be taken to the East Dallas yards and then broken out of the

train and switched back. No, I don't think under the new scheme, a car coming from Fort Worth to be delivered to the Fulton
178 Bag & Cotton Mills would have to travel ten and a quarter miles in a circuitous round about way up to White Rock and then come back over our own track. I don't think it is nearly as far as that. I should say about six miles. I may be mistaken about that; six, seven or eight miles; I don't know; I never had occasion to measure it. Mr. Mitchell, the engineer, would know.

I don't recall whether there are or not a number of industrials along that track where they are proposing that subway. I have lived in Dallas since July 1, 1918, having removed thereto from New Orleans. I was not in Dallas in 1908 and did not take any observations on the unprecedented flood of the Trinity River in that year. Our high water marks of that flood were taken from the records of the railway company. I have not made any levels from the Trinity River and Pacific Avenue. According to Mr. Preston's report he was going to start depressing the tracks immediately at the east end of the Texas & Pacific bridge across the Trinity River. That is, he was to start at Water Street which is 50 feet away. The track at that point is 6 feet 2 inches higher than the high water mark of 1908. That tunnel could not be drained without pumping. I don't know what you would drain it into.

Those industrials on Pacific Avenue are relatively valuable feeders to the Railway Company. All industrials are valuable to the railroad. Some are more valuable than others. I have never entertained the idea that those industrials on Pacific Avenue were other than relatively valuable. Armour and Company's plant is a good sized industry. I don't know the extent of the revenue it affords to the railway company. There has always been some question in my mind as to whether or not packing house traffic is valuable because it bears a very low rate. I would not say that it is immaterial to the
177 railroad whether it had the Armour business or not, but it is not very attractive traffic. Of course, had there not been a programme to take the main tracks off of Pacific Avenue I would not, when I was receiver of the Texas & Pacific Railway Company, discontinue the switch track service to the Armour plant. The proposition to take up the switch that serves Armour's plant is only incidental to the general scheme of taking up all the tracks. When the matter of taking up the tracks from Pacific Avenue was first brought to my attention by Lindsley, who was then Mayor of Dallas, I explained to him that my great objection to abandoning the tracks on Pacific Avenue and the use of a belt line around the City, was that I would forfeit the benefits of the industrial situation or the industrial advantage that the Railway Company had in Dallas. I pointed out to him that many industrials had grown up along the tracks that were of very great value in securing traffic. I did not tell Lindsley that the industrials along the track were only relatively valuable. I told him that the value of the Texas & Pacific's location on Pacific Avenue was very great from the industrial standpoint.

This whole scheme of removing the tracks from Pacific Avenue

and getting a large section of territory in what is known as the Industrial District, and a belt line, is purely the result of contract. We would have been well satisfied to have remained as we were had it been, in my judgment, a practical thing to do.

In asking me about a contract between the Texas & Pacific Railway Company, its Receivers and the Wholesale District Trackage Company, to which the City of Dallas was not a party, I don't know what you are getting at. The scheme of removing the tracks from Pacific Avenue did not originate with the Wholesale District Trackage Company. The original discussion was between myself and the Mayor of the City of Dallas, and I never did have any relations with any trackage company except at the closing of this contract when the Wholesale District Trackage Company was formed and put
178 into this contract as a vehicle for handling the property. I never had any conferences or agreements with Lee, Prather and Seay, the Citizens Committee, except with the Mayor being present. My whole negotiations, in my mind, were with the City. I wrote the proposed contracts that were tentatively agreed upon. I wrote all the drafts except one. That one was written by Mr. Rhodes S. Baker, whom I understood at that time was acting for the City and the Committee of Citizens whom the Mayor had invited into the transaction for the purpose of getting the property that the Mayor originally proposed to be turned over to the Texas & Pacific Railway Company, partly to protect the City's industrial situation as against the industrial situation of other cities, and partly, of course, to protect the Texas & Pacific's industrial situation in the City of Dallas.

I don't recall it, but there may have been a contract le and between the Railway Company and its Receivers and the City of Dallas that was tentatively agreed upon and to which the Wholesale District Trackage Company was not a party. I want to be absolutely accurate about it and I am not prepared to swear whether there ever was a contract drawn to which the City and the Receivers were the sole parties. I don't know whether there was or not. Originally it was agreed that the Railway Company and its Receivers should have in this so-called Industrial District their rights of way through a specified number of blocks. I don't recall how many blocks. Afterwards it was announced to me that they couldn't get all the territory that was promised and I had to take a less amount of territory. I think we were to have about 20 blocks. After that the area was diminished. The City of Dallas didn't pay the Trackage Company $100,000, as I recall, nor does it contract to pay the Trackage Company $100,000. It contracts to pay the Texas & Pacific Railway Company $100,000. No, the contract to pay the Wholesale
179 District Trackage Company $100,000 was not put in the contract because they failed to give us the 20 blocks they had previously promised and had cut it down to 10 or 12. It was put in the contract to help the Trackage Company $100,000 to buy the land they had agreed to give the Railway Company and its Receivers. Certainly, the $100,000 the City pledged itself to give the Trackage

Company was put in there in order to enable the Trackage Company to get some land and territory in the industrial district.

Yes, ever since the appointment of the Receivers of the Texas & Pacific Railway Company they have operated the switch that serves Armour's plant and as it was a part of the transportation system it continued to operate it as a part of its transportation system just as the Railway Company had operated it prior to the appointment of the Receivers, but I am not prepared to say how profitable it was. I couldn't make the statement either that it was profitable or unprofitable. I don't know how many cars Armour's plant handles per annum. I couldn't tell you whether the operation of the switch was profitable because I have no knowledge of the revenue derived from it and the cost of operation, and therefore have no way of telling you whether that particular switch is profitable or unprofitable. I don't know that Armour handled 600 or 700 cars per annum. I don't know whether anybody would know without going into a very complicated accounting.

Query by the Court: Did you make any calculation as to the cost of the tunnel?

Answer: I did not, sir.

Question: You can't make an approximate statement as to the cost?

Answer: Well, the scheme would involve I should say six or eight million dollars, and that is entirely just a rough guess.

180 Cross-examination continued by counsel:

I don't recall who furnished the data on that subject for the answer in the New Orleans case.

Q. Well, that was two million. Has it grown four million since then?

A. That was elevated, wasn't it?

Q. No, sir, subway.

A. I am not prepared to say."

(43) J. W. EVERMAN, a witness on behalf of the defendant, testified as follows:

"My name is J. W. Everman. I reside in the city of Dallas, and have resided there since 1886. I was connected with the Texas & Pacific Railway Company thirty-three years. I severed my official connection with it in June, 1914. I was General Superintendent of the Texas & Pacific in 1912 under Mr. Freeman's appointment. Yes, I had negotiations with Mr. S. S. Jerome in connection with the industry track for the Armour people and the City of Dallas in 1912. They had a plant located on our track and wanted to move it and asked me if we would build a track to the new location in the event he bought the property on the corner of Harwood and Pacific Avenue, and I told him yes, if he got authority from the city to build the track we would build it. We had a number of negotiations. He came and told me he had this particular piece of ground

in contemplation and told me to keep that secret, that he didn't want it known, that he had two other locations that he was considering, and all of which I promised him, and then we had a number of conferences after that. At the time we were having these conferences as to the construction of his plant on the Texas & Pacific, an industry track, he already was located on the Texas & Pacific with an industry track. There was no written contract or agreement made
181 with Mr. Jerome. We expected to submit our proposed form of contract for consideration and induce the beneficiary of the contract to sign it, if it was possible to do it. We had a standard form of contract for industry tracks, and with strict instructions to be governed by the conditions of it. Armour and Company were requested to sign the industry contract. Mr. Jerome wouldn't sign it; he took exception to certain of the conditions and I told him we couldn't change the conditions at all, and finally it was put in without his signature. I considered it our industry track. I consider that we had much better right to use it, and greater privilege of using it, for other business if no contract was signed covering it. When Armour and Company signed no contract for it I consider this track ours. The particular reason why the Texas & Pacific had adopted a standard form of industry contract was that we had a suit against us for taking up a track, the Warner suit, where the claimant alleged we had agreed to keep the track in there forever. It was an oral agreement. We hadn't done any business on that track for a long period and we took it out, and he couldn't sell the property then for what he thought it was worth and he sued us. That standard form was adopted, and parties who want industry tracks were required to execute the standard form. It has a contract for the management of the property, and that standard form was presented to Armour and Company in this instance, and they refused to execute it. The Texas & Pacific Railroad paid for the construction of this track for the ties, grading, fastenings and labor. Armour and Company paid nothing. I did not act in any different way, except the usual way, in the matter of going about the construction of this track for Armour and Company. I don't know how many industry tracks we had on Pacific Avenue in 1912; a great many. As to the steps that were usually taken in the matter of all industry tracks
182 along Pacific Avenue, we tried to induce the beneficiary to sign our contracts. We always interested the beneficiary in obtaining the ordinance from the city; we thought they had some influence with the city, more than we had, for one reason. Armour and Company joined the Texas & Pacific in making the application for the ordinance. I was furnished with a copy of it and after it was obtained, accepted it for the Texas & Pacific. That was the usual routine, and we always filed these with our Land Department. I did not take into consideration, in consenting to put in this industry track, the purchase by Armour and Company of any property, or the gift by Armour and Company of any property to the City. I never heard of that gift before. I merely agreed with Armour that we would put in the industry track if they got the proper ordinance. Armour & Company's business was extremely attractive; they would

get custom for the Texas & Pacific. We felt most kindly towards them and wanted to do everything we could and get all the business we could. Yes, they were still located on the Texas & Pacific track."

On cross-examination the witness said:

"Yes, I knew when I went out with Mr. Jerome to examine the lot in question and see if we would put in a switch, that Armour hadn't bought it. He was just figuring on buying if he could get that switch. Yes, Mr. Short sent me a copy of this Armour ordinance away back in June, 1912. Oh, we agreed to put that track in, contingent on securing the franchise. No, I did not know that the city wouldn't grant the franchise unless Armour made a dedication of certain corners. I agreed to put the track in before it was specified in the ordinance. I didn't know anything about the fact that when the ordinance was passed it required Armour to make a dedication deed of part of his lot. Yes, I suppose I read the ordinance that Mr. Short sent me. I wrote him it was satisfactory, and that we would commence building that switch
183 in there just as soon as the details could be arranged. Well, Mr. Jerome told me he wouldn't build there unless we would build the switch, certainly. To tell you the truth, I didn't think he was going to get the ordinance at all. Yes, he got it, and got it for twenty years. Yes, we were both looking towards the terms of this ordinance. Why certainly I had the franchise.

I don't remember whether the Texas & Pacific has been on Pacific Avenue for nearly fifty years; I didn't work for them quite that long. It has been there ever since the thirty years I commenced to work, and was there some time before. Yes, the City of Dallas conformed its conditions to the existence of that track there, on Pacific Avenue, and its development was eastward, along parallel streets, south of Pacific Avenue. No, I do not know the block of ground that the Government gave $250,000 for. Yes, you read in his answer to the interrogatories that Mr. Short talked to me about this switch. I don't remember dealing with Mr. Short. I remember very plainly dealing with Mr. Jerome because I had dealings with him for twenty odd years. I knew him before he came to Dallas this particular time. Yes, Judge Hall was the general attorney there at that time. I was the smallest T. & P. man, in stature, that was around Dallas at that time. I was general superintendent and there was no one over me in Dallas in point of authority."

On redirect examination the witness said:

"Yes, I had already agreed with Armour and Company that we would put the industry track in there when they got the ordinance. That was months before I ever saw the ordinance. That was the usual detail that was always gone through in the matter of industry tracks. Yes, I continued that agreement after I saw the ordinance. Yes, I was merely General Superintendent. I was not on the Board of Directors in 1912."

184 (44) Mr. FLETCHER F. MCNENY, a witness for the defendant, testified as follows:

"My name is Fletcher F. McNeny. I reside in Dallas, Texas, and have resided there off and on about twenty years. As to my connection with the negotiations concerning the removal of the tracks of the T. & P. on Pacific Avenue, I didn't come into the negotiations until after the arrangements were practically decided upon. In January of 1917, being in the real estate business, I was called to Mr. Baker's office, who was one of the committee who had been appointed at a mass meeting to try and work out a solution of this problem. Mr. Baker laid before me maps and plats, saying that they had tentatively agreed upon, and called my attention to the fact that the railroad ran clear out of Dallas and down one of our cardinal streets. There are four main streets there, Main, Elm, Commerce and Pacific Avenue. Mr. Baker was appointed at a mass meeting, after this matter had been agitated for years, and it crystallized during the Holland administration, when a mass meeting was called and Mr. Baker was appointed as one of the committee to work out a solution of the problem. He, Mr. Baker, presented me with these maps and plats and showed me their tentative agreement, what it would cost to get into this district. He had before him at the time a blue print of this industrial district that was proposed to be got for the railroad, and he wanted to know, from my experience as a real estate man, what it would cost. After going over the whole matter thoroughly with him, I took it under advisement and talked about it to my brother, and we figured on it for probably weeks to get right down to the entire cost of it, and finally gave an estimate of it. It was my understanding that it was to be reported by him back to the committee and to the city authorities and I was afterwards called into a meeting at the City Hall. Mr. Lancaster, I believe, was present,

185 and the city authorities and the committee, and the press agents of the city, and out of that meeting came this announcement here, this full page in the Dallas News, on February 4, 1917, announcing that this committee had agreed, and the railroad had agreed to accept this district, and the committee had agreed to undertake to get it for them, which would necessitate raising about $700,000 in popular subscription to buy this right of way. So after that—we had only been in an advisory capacity—the committee then asked the various real estate agents in the city to put in a bid on the work. Feeling that the way — were going to require money—property was going to increase in value on Pacific Avenue by reason of removing the tracks, and in the new district it was going to increase by reason of placing them there, so they naturally felt that the real estate men were better qualified to go out and raise the money. The bids were put in and the contract was finally awarded to my firm, which was composed of my brother and myself, and we worked on the plans continuously and exclusively since that date, and about the 10th of February, 1917—Our work was to raise the money. At first we had to get in there

and see if we couldn't get options on all the land that was necessary to acquire the right of way.

The money was to buy this right of way to be given to the railroad in exchange for the franchise on Pacific Avenue. We first had to find out, of course, what the property would cost, we only had approximate estimates, so then we went on, and it took us about six months, I think, to get all of the options. We had announced our plan, everybody knew what was going on and a great many people thought that was the occasion to hold up the railroad. We had some trouble in convincing them it was not the railroad at all, it was the citizens, and the working out of the solution of the problem, and if the prices were prohibitive we would have to get the railroad to accept some other district, which course is outlined in this article here. We found it would cost $711,000 to buy the property. At that
186 time I think a good deal of publicity was given to the fact that we had bought some property, and tried to make it appear it was a real estate scheme. When that came out, we offered a $75,000 reward for any option that could be found that was for any other purpose than for right of way purposes, or would be used by those who had it for any other purpose. Of course, nothing ever developed out of it. In getting into the district we had to acquire more property than was needed for actual right of way, because if you just take a small portion across a lot of course the lot is damaged or ruined, and hence you have to buy it all, on the chance there would be a good deal of salvage and this would be sold as the occasion arose, and refund made to the subscribers, and for that purpose and also for the purpose of a vehicle for transferring the property to the railroad, the Trackage Company was organized as a semi-public institution, with a nominal capitalization of $200. After we had acquired all of these options and found what the cost would be, the big job still in front of us was to raise the money. So after a number of conferences with our committee, we worked out a plan. Of course we had no law to assess the beneficiaries, as they have in other places, so we worked out a plan that we thought was fair and reasonable, apportioning the cost of this work against the properties benefited in proportion, of course, to the benefits accrued, covering a very wide district, not only Pacific Avenue and the new industrial district, but also outlying districts and districts in close proximity to the project, ranging in price from $10.00—this is the apportionment of cost—from $10.00 per foot to $75.00 per foot frontage, and went out in an effort to raise these subscriptions, and we raised finally about $550,000 in that way, and we found that we couldn't get any more, and it was thought we could come to New Orleans here and get the railroad company to accept a less district. In the meantime, however, we were to get the property where the present passenger terminals
187 are, and it was to be given to the committee to put in the trade. That is the Lamar Street station. We got the city to buy that property for the sum of $100,000 to help to raise the money to pay for the right of way. When we found that Mr. Lancaster wouldn't accept what our $550,000 could buy, and we couldn't

raise the sum we first called for, we finally got a compromise by getting the city to buy this property, which was given it at that time at the price of $100,000, to be spent in right of way, and we finally traded on that basis. And then our options—when we first went in to get these options we got twelve month options, and they were beginning to expire by the time that we raised the $550,000—so then we went back and began to close out the property, taking the property and putting it in escrow with the bank under a four month escrow agreement, with an automatic extension of six months in the event we didn't get through. We got all of them, practically, I think, all of them where we can deliver them now to the railroad, ready with the survey, which has been an enormous task, and it has taken us two years. It was estimated we would have great trouble in raising that much money considering the war conditions.

Pacific Avenue runs parallel with Elm Street which is the highest price retail district in Dallas, property on which ranges from $— to $— per foot front, whereas on Pacific Avenue they only range from $— to $— per foot. In taking the railroad tracks up from Pacific Avenue it would be very natural to presume that that property would very materially enhance in value. In fact, on all other streets beyond Pacific Avenue values have gone to $1,000 or $1200 per foot, so if a man can get ingress to and egress from the property with its close proximity to the business district it was bound to increase in value. The inducement I held out to raise money for the project was that the removal of the tracks from Pacific Avenue
188 would increase the value of the property thereon. I know where the Armour plant is situated and am familiar with the value of that property and of the adjacent property. My best estimate is that the value of the Armour property, that is the land, would increase were the tracks removed from Pacific Avenue. I think it would easily double in value. The Armour lot has increased in value since 1912 and my estimate is that it would double the present value thereof to remove the tracks. As to extending the industry track serving the Fulton Bak & Cotton Mills would say that we would not get our subscriptions if we told the subscribers that the tracks were coming up to within 75 feet of Preston Street and in my judgment the extension of that industry track would invalidate the subscriptions and that the subscribers would refuse to pay because we would not have carried out our promise as to the removal of the entire trackage from Pacific Avenue. The inducement held out to the subscribers was that Pacific Avenue would be made a retail street, and a boulevard to relieve the congestion. The congestion of the adjoining streets is something awful, in fact at the police court in the city, one block removed from the street, there are an average of 19,000 vehicles in twelve hours. The Fulton Bag & Cotton Mills make bagging and are not competitors that I know of with Armour and Company; they are not in the packing business.

I should say that the question of removing the tracks from Pacific Avenue has been agitated for 15 years. The crystal-ization of that agitation was I think brought about by a mass meeting. It was back

in the Holland administration and it has been agitated from time to time with intervals, and finally a mass meeting of citizens was called. It was about the time that Judge Holland cited the railroad to appear and show cause why they should not remove the tracks.

If I remember correctly that was in 1914. The business dis-
189 trict is on the south and seventy per cent of the residential district is across those tracks. They also say that it is a well established fact that the city is bounded on the west by the Trinity River and on the south it has developed into the river bottoms, and on the east into White Rock, and that the only natural development of the city would be north across those tracks, and that percentage would increase as the city grows because it is all high land or hills out to the north and northwest, and of course the danger in connection with the citizenship daily crossing these tracks was the thing that brought it about.

Pacific Avenue is right in the heart of the business district of Dallas. Elm Street is the largest retail street in Dallas and it is 200 feet from Pacific Avenue. The next street is Main and the next is Commerce. Those are the four cardinal streets. The business district extends towards Trinity River as far as Lamar Street. There is no retail business west of Lamar Street on any of the streets named except a little wagon trade around the court house square. There is much travel on the streets between Lamar and the river across Pacific Avenue. There is one street between Lamar and the river that you would have to cross Pacific Avenue with any traffic at all and that is at the freight station. The volume of traffic is east of Lamar Street, and up to Preston Street and that space is covered by the removal of the tracks. Olive Street crosses Pacific Avenue between Preston and Lamar. Preston Street practically stops just across Pacific Avenue and makes into Swiss Avenue. Preston Street does not carry a great deal of traffic. Swiss Avenue comes in and intersects Pacific Avenue and stops there and it is the inte[illegible]on of that boulevard system to divert that traffic down Pacific A[illegible]nue, so that when the tracks are taken up on Pacific Avenue, Swiss Avenue
190 won't cross it but will be turned down into Pacific Avenue. It now goes across and goes down Main and Elm which has the double car track system, and we propose to turn it right into the boulevard where there will be an absence of all tracks and switch tracks. Then there is Pearl Street and Masten and Live Oak. Masten and St. Paul are practically the same. Bryan is a very important street and then Akard and Emma Street and Griffin and Patterson, Lamar and Camp. Main, Elm and Commerce are the active business streets as far out as the H. & T. C. These cross tracks all lead from Pacific Avenue to Elm Street and the traffic from Elm and the other streets beyond cross and taper with the track on the north side. That is, they want to get out of the way from the congested district. The original plan contemplated taking up all the tracks through the city up to the Fair Grounds. That contemplated plan existed before I got into it. When I came into it they had accepted the other plan. There are not a great many streets at that time and it was not in the congested district and it was not very necessary to

remove them at that time. The business district practically stops at the H. & T. C., East Dallas. I remember that the various Mayors had platforms upon which they made their campaign and that they favored the removal of the tracks.

I am familiar with the district from the H. & T. C. to Trinity River and with the industries located between Preston and Lamar Streets. There is no opposition from any of the other industries to the removal of those tracks. Armour and Company are the only industry objecting to their removal, practically all of the others have contributed to the project. Between Preston and Lamar Street- on Pacific Avenue there are the following industries: The Texas Paper Co., The Dallas Paper Co., and the Southwestern; The Western Electric Company, Armour, Swift and Wilson & Co.; The Texas Glass &
Paint Co., Fulton Bag & Cotton Mills, Pacific Warehouse Co.,
191 The Chase Warehouse Co., Huey & Philp Hardware Co., The Times-Herald Publishing Co., Cullem & Boren, Fake Furniture Co., Rodgers-Myers Furniture Co., and the Anderson Furniture Co. Swift & Co. and Wilson & Co. are the packing industries on Pacific Avenue other than Armour and Company. Swift's plant is very small. They have only 25 x 100 feet. The paper concern is very large. They have 60 x 200 with a very good building, three or four stories. Huey & Philp are in the hardware business and are using the first two floors of the T. & P. office building. That building is not served by a switch. They have a warehouse just across from the retail building which I think is served with a switch.

On cross-examination the witness testified:

"The Wilson plant is in the same block as the Armour plant and is served by the same switch. Their building is small and they need a new one. The great paper building I spoke about I think collapsed a year or so ago. I think the building was strong enough but they overloaded it. They have fixed it up into a very good building.

I was present at the meeting of property owners at the Chamber of Commerce. I don't know that every one of them was a property owner but I do know there were a lot of property owners there. I don't know when Henry Lindsley sold that lot to the United States Government for $250,000, but I do know that it was prior to his becoming Mayor. That lot is located north of and one block from Pacific Avenue. That lot cost Lindsley about $40,000 or $50,000. I was a stockholder in the Central Real Estate Company. Mr. Lindsley and Mr. Wilson I think were the principal stockholders. It was chartered a number of years ago. I got stock in it about the time it was chartered. I know some of the properties that corporation acquired. That corporation is one of the contributors to the
track removal fund.

192 When I stated that Pacific Avenue is in the heart of the business district of Dallas I meant that it is on the northern edge of the business district. There is a good deal of business in a district north of Pacific Avenue. My brother and myself have a compensation contingent upon the result of this litigation and of the

scheme of removing the tracks, and I am largely interested in it financially. I worked up the subscriptions to the Pacific Avenue project on a commission if it goes through. I worked up the acquisition of titles and options in the so-called Wholesale District Trackage territory on a commission contingent upon the result. I also went into another district, called the prospective district, of which this Post Office site sold by Lindsley to the Government is the storm center, and I worked up an assessment there on a commission basis. Also as real estate agents, my brother and I were employed to get the right of way for the contemplated circuitous route of the H. & T. C. on a commission basis. Our compensation as to the removal of the tracks of the Texas & Pacific from Pacific Avenue depends upon the success of the scheme. A citizens' committee was formed and they were incorporated into the Wholesale District Trackage Company just to get a vehicle to handle the property. The capitalization of that company is $200. The following telegram was sent by that committee to H. L. Bromberg and a few others who hadn't subscribed up to that time:

'Dallas, Texas, 5 p. m., Feb. 1, 1918.

Henri Bromberg, Commonwealth Bldg., Dallas, Texas.

Track removal project at extremely critical stage, we still can't believe property owners will allow this plan to fail. Unless few remaining owners will subscribe their part committee must admit failure, which means enormous loss to interested property owners. Committee in desperate straits. We appeal to you for help. Now may we count on your subscription in the event total amount
193 is raised? Please answer.

HARRY L. SEAY.
J. E. LEE.
HUGH E. PRATHER.'

Yes, sir, I have tried to sell Armour a piece of property for a new location for their business. Armour authorized us to sell the Dallas plant for $150,000, but there has not been anything doing in the selling of property for four years. It is almost impossible to sell at any price. Here the witness identified the following as some of the holdings of the Central Real Estate Company:

	Rents.	Value.
"A"—1919-21-23-25-27 Bryan Street, 98½ x 117½ feet, block 244	$225.00	$75,000.00
"B"—509 N. Harwood Street, 43 x 99 feet, block 244	50.00	22,500.00
"D"—1920 Bryan Street, 50 x 77 feet, block 94	25.00	22,500.00
"E"—504-6 N. Akard St., 5 x 98 ft. Blk. 235	.....	25,000.00
"G"—1608 Federal Street, 42 x 123 ft. Blk. 237	.....	14,000.00
"H"—606 N. Harwood St., 89 x 136 ft. Blk. 246	65.00	36,000.00
"I"—314-316 Masten St., 60 x 140 ft. Blk. 478	80.00	35,000.00
"J"—709 N. Harwood St., 50 x 141 ft. Blk. 1/243	40.00	21,500.00
"K"—Masten & Federal Sts., 92? x 100 ft. Blk. 2/243	.....	50,000.00
"L"—Bryan & Ervay Sts., 82 x 100 ft. Blk. 237	290.00	90,000.00
"M"—Bullington St., 50 x 100 ft. Blk. 233	.....	20,000.00
"N"—2001-2005 Bryan St., 500-2-4-6 No. Harwood, 100 x 100 ft. Blk. 247	275.00	75,000.00

All of the property in that list is north of Pacific Avenue, and is in what is known as the prospective district. When we took subscriptions for the purpose of raising money for the purpose of acquiring the blocks of land in the so-called new industrial
194 district, to give to the Texas & Pacific, the subscriptions were taken in the name of Harry L. Seay, J. E. Lee and Hugh E. Prather as trustees, and those men sent the telegram hereinabove copied to H. L. Bromberg. It was sent from Dallas to H. L. Bromberg in Dallas. The subscriptions we obtained for the purpose of consummating the scheme for the removal of the tracks were obtained from three sources: First, from certain property owners on Pacific Avenue who believed the removal of the tracks would enhance the value of that property; second, from the people who, like the Central Real Estate Company, owned property north of Pacific Avenue and in what we call the prospective district. They contributed because they thought their property would be enhanced in value by the removal of the tracks. And third, from those owning property in this contemplated industrial track district who thought their property would be enhanced by the removal. Those were the only three sources from which we got subscriptions, with the exception of what the city agreed to pay. The city contracted to pay this $200 corporation $100,000.00 for the old Texas & Pacific passenger station on Lamar and Pacific Avenue.

That agitation for the removal of the tracks from Pacific Avenue started at a mass meeting of the citizens without reference to property owners at all. I have forgotten where that mass meeting was

held. That was before I was employed and asked to give an opinion of the realty values, but there was a great deal of publicity given to the matter, so by the time Judge Holland cited the railway company to appear and show cause it had all crystal-ized and it had been going on in Mr. Hays' administration before Holland. Lawther is the present Mayor. He succeeded Lindsley and Lindsley succeeded Holland. Lindsley was Mayor two years and the others named served four years. Dallas has a commission form of
195 government and the Mayor is elected for two years and usually gets a second term. Holland succeeded Hays and Hays succeeded Smith, and Smith succeeded Traylor, and the removal of those tracks was agitated during those administrations, before my firm was employed for this work, and the reason they were employed was because they had no real estate holdings in the district and most every other real estate agent in the city had."

(45) J. E. LEE, a witness for defendants, testified:

"My name is J. E. Lee. I am in the insurance business as manager of a life insurance company of Texas. I was Commissioner of Streets and Public Property of the City of Dallas from May 1, 1911, to May 1, 1913. I am familiar with the traffic conditions in Dallas, particularly on Pacific Avenue. I am familiar with the district known as the industrial district in this controversy. I have no statistics upon the question of what proportion of the population of Dallas resides north and east of the Texas & Pacific Railway; I should say that over half of them, but I couldn't make a definite answer. Akard, Live Oak, Bryan, Ervay, Harwood and Preston Streets are very closely blocked streets. Very crowded with traffic, especially Akard, Ervay, Live Oak and Harwood. Bryan and Preston Streets are of minor importance compared to the other three.

I was one of the Citizens Committee to remove the tracks from Pacific Avenue. That was during the Holland administration and it commenced May 1, 1915. The streets in what is known as the industrial district are not used by the general public except such part of the general public as travel on the North Dallas street cars. They are not much used by pedestrians and vehicles. The railroad tracks on Pacific Avenue monopolized that street to such an
196 extent that where one man travels up and down Pacific Avenue I would say that five thousand travel up Elm which is the next street. That is just a guess, but it is so enormous you can't compare them at all. That does not refer to people who cross Pacific Avenue. I mean people who use Pacific Avenue.

I had a conversation with the representative of Armour and Company before they bought the lot. I was Street Commissioner at the time. My recollection is that most of my conversation was with Mr. Short, their attorney. There were discussions between myself and Mr. Short as to the city's attitude as to the removal of the tracks from Pacific Avenue." Here the witness was asked to state to the court what such discussions were. Thereupon the plaintiffs duly objected to the question and the answer sought to be elicited thereby

because all oral negotiations or statements were merged in the written contract which consisted of the ordinance granted by the City and its acceptance. The court overruled the objection and permitted the witness to answer as follows: "I can't give the exact words of the conversation. I notified Mr. Short that my desire and policy was not to put any more tracks on Pacific Avenue; that there hadn't been any granted for some time and that it was a cherished hope of the people of Dallas some time to remove those tracks that were there. Mr. Short explained to me that they needed to be on the Texas & Pacific Railway because their packing house was on that road, and that they also needed to be close to town, and the agreement was finally reached to give them, to permit the Texas & Pacific to put them in tracks there, with a proviso;—to which ruling the plaintiffs then and there duly excepted. I made a statement to Mr. Short as to whether or not the switch would be granted or not, before I finally entered
197 into the final contract. Mr. Short and myself had a great many conversations. I couldn't recall the words but I remember giving him that warning about the proposition. The warning was that we wanted to feel free to remove all tracks from Pacific Avenue." To this testimony at the time it was offered the plaintiffs duly objected on the ground that all oral negotiations leading up to the consummation of the written contract were merged therein. The court overruled the objection and admitted the testimony and plaintiffs duly excepted. "I don't know that I notified Mr. Short of the conditions upon which this switch track would be accepted. I did say this: I couldn't do it until it was voted on.

The matter of securing options in the industrial district were left to McNeny & McNeny. The Wholesale District Trackage Company was organized and incorporated. The options taken to the land in the industrial district were taken in the name of Harry Seay, Hugh Prather and myself as trustees. The Wholesale District Trackage Company was a party to the final contract. I own property on Pacific Avenue. As to what extent the use of the tracks on Pacific Avenue affects the value of property thereon, I will say that property at the corner of Ervay and Pacific is worth, on the south side of Pacific it is probably worth,—I have had some offered at $500 a front foot; on the north side it is much less. The property located on Elm Street is worth $2500 to $4500 per front foot. These two streets are 200 feet apart. The general public uses Elm Street and the Railroad uses Pacific Avenue."

Cross-examination by the defendant, City of Dallas:

"I had the conversation with Mr. Short before Armour and Company bought the lot in controversy." At the time this testimony was offered the plaintiffs duly objected on the ground that all oral negotiations leading up to were merged in the written contract, which objections the court overruled and admitted the testimony, to which ruling the plaintiffs then and there duly excepted.

198 Cross-examination by the plaintiffs:

"I am the J. E. Lee who was Commissioner of Public Streets in the City of Dallas in 1912. A petition on April 19, 1912, was addressed to Hon. J. E. Lee, Street Commissioner and the Honorable Board of Commissioners of the City of Dallas, and it was signed by the Texas & Pacific Railway Company, by J. W. Everman, by Armour and Company by S. S. Jerome, Agent, Elmyra Hayes by S. L. Hodge trustee, and Mrs. Mary Hauck. That petition was for a franchise to be granted to the Texas & Pacific Railway Company to construct and maintain a switch track connecting with its line of railway on Pacific Avenue to be operated as an industry track. I know that I inspected the premises and recommended that the franchise be granted. I am the man who made the report to the Board of Commissioners. My report reads as is set forth in paragraph 8 of the plaintiffs' bill of complaint herein. I made that report. I was one of the Citizens Committee. That committee may have sent some telegrams from Dallas to people in Dallas about the project. I couldn't tell you how many. We very likely sent the telegram you read to me." The telegram read to the witness was of date February 1, 1918, addressed to Henri Bromberg by Harry Seay, J. E. Lee and Hugh E. Prather, and is set forth in the testimony of Fletcher F. McNeny.

199 (46) FRANK MCNENY, a witness for the defendants, testified as follows:

"My firm, McNeny & McNeny, was employed by the Citizens Committee to assist in the matter of getting the land necessary for the industrial district. That land is in the process of being acquired. I should say that 98% of it has already been acquired. It was taken in the name of the Wholesale District Trackage Company. By the terms of the contract made in acquiring this land there is some of it we would call salvage. That is, it wouldn't be property left that will not be needed but it was necessary to get the land in order to get the portion required for trackage. That is the only instance in which the land was taken and that part of it belongs to the Wholesale District Trackage Company. Under the terms of the contract the Wholesale District Trackage Company were to convey to us the old depot down town and the City of Dallas was to buy that property from us. So far as I know, that is a bona fide transaction. The purchase of that property would be a very important part of the program.

As to not being able to acquire all of the land as originally contemplated, I will say: When we were employed and went into the project to find out if it could be acquired and at what prices and take the options and report back to the Committee, they were then devising plans, and to see if the plan could be carried out, we found that it would require about $700,000.00 to get the tracks into the district or to buy the property that was necessary to get the tracks into the district. That was to be given to the railroad in lieu of the franchise

they would surrender on Pacific Avenue. After a number of meetings and trying to figure out the fair apportionment of the cost to the benefitted property owners, they decided on a plan, which I think has been submitted and is of record, and then we went out to get subscription notes. We had no law here which would assess it.

200 It was just in the way of a public subscription note, subscription to the project in the shape of a note to raise these assessments, and we were unable to raise the amount of money needed, and we then attempted to get the railroad to accept a less district, which we were unable to do—we had whittled them down from time to time, and they finally got down to a point where they wouldn't accept less, said that they would prefer to remain on Pacific Avenue and undisturbed. We were then at our row's end, and I think it was about that time we sent some of these telegrams Mr. Etheridge introduced. Being unable to raise any more money, or much more—I think we raised some—we appealed to the City for something. We were getting the old franchise, and we considered that of a great deal of value—so then we appdied to the City to help us, and got them to purchase this property, which was a very important link in the boulevard, and pay $100,000.00, which was our shortage—we were short about $150,000.00, but we afterwards raised, I think, the remaining portion, and that was in the shape of the City's part to this project. It was of very great benefit to the City, and so recognized in the beginning. I think that's about all that wasn't put in the record."

201 (47) W. W. PEEVEY, a witness for the defendants, testified as follows:

"My name is W. W. Peevey. I am City Secretary of the City of Dallas and was such at the time of the execution of the contract between the Texas & Pacific Railway Company, its Receivers and the City of Dallas relating to Pacific Avenue. My name is signed to that contract as Secretary. I never presented that contract to the Auditor to have him countersign it. I believe the date was August 23, 1918, we had a meeting of the Board of Commissioners, at which a resolution was adopted authorizing the Mayor to execute this contract, and that resolution was adopted by the Board of Commissioners, and the contracts were executed in the Mayor's office. I attested the Mayor's signature and placed the seals on the contracts, four in number, and they were left with the Mayor, and it was my understanding they were given to a representative of the Texas & Pacific Railway to be sent to the Railway Company for execution by the Receiver. About may be three or six weeks—three or four weeks after that, the contracts came back, as I remember it, because I had failed to attest the Mayor's signature on one of the copies. That was done and they were again returned to the Railway Company. That was about the last that I saw of the contracts until one copy finally reached my office, which was the City's copy of this contract. I have that contract among the archives of my office. I never did present it to the Auditor. I ordinarily do present a contract to the Auditor. That

is my duty. After a written contract is approved by the Board of Commissioners I attest it and then after we make a note of it on the minutes the contract goes to the Auditor's office."

Cross-examination:

"The only contract I have is the original contract between the City, the Wholesale District Trackage Company and the Receivers of the Texas & Pacific Railway Company. I do not know of any other contract."

202 (48) R. V. TOMPKINS, a witness for the defendants, testified:

"My name is R. V. Tompkins. I am City Auditor of the City of Dallas and have held that position more than six years. I was Auditor in 1918. The contract between the City of Dallas, The Wholesale District Trackage Company, Texas & Pacific Railway Company and its Receivers was never given to me by Mr. Peevey, the City Secretary, and I never had occasion to pass upon it at all. It has never been presented to me for signature. The City of Dallas has been under an injunction since May 10, 1919, in the State courts restraining the City of Dallas from carrying out that contract. My understanding is that one of the grounds urged in that suit is the fact that I didn't countersign the contract.

There is a 25¢ tax provided by the City Charter which is devoted to creating a special fund called the "Street Improvement Fund." All charges for Street Improvement work are made by the Auditing Board. If a class of work comes up in regard to contracts, the specifications are first adopted, the bids are advertised, to see who bids, those bids are opened at the regular meeting of the Board. They are in most cases referred for a report to the Commissioner. That comes back and an award is made. I might state first, though, that the original proposition, the Commissioner makes a recommendation that the street be improved. That would be the first proposition. The Board either acquiesces or turns down his original proposition. If they accept his original proposition, it goes through to the point as far as I have got. When these bids are opened, the work is awarded; after being referred to the Commissioner and coming back, he recommends that the work be awarded to such and such a party, contractor or firm, and that the portion to be charged to the City is such and such an amount of money, it being charged to the Street Improvement Fund or such other fund. If a proposition
203 comes through that I don't think is properly chargeable to that fund, it is my duty as Auditor to make some report to the Board on that and have the matter threshed out. I am finally guided in the matter by a legal opinion from the City Attorney. The charter provides that the City Attorney shall be the man to decide those final matters, questions of legality and those things. After the contract is executed, at the last awarding of the contract they ask that the City Attorney be instructed to prepare the contract and bond, and after the contract and bond have been prepared they

go back to the Board and the Mayor is authorized to execute the same, and the City Secretary does that as the Secretary of the Board of Commissioners, and they bring them back and they go to the Board of Commissioners and I check them over to see that all blanks are properly filled, the bonds all properly executed, and that it is a proper account to be charged to in my estimation, and so forth. The $100,000 which the City in the contract in question agreed to pay the Wholesale District Trackage Company is chargeable to the Street Improvement Fund. The 25¢ levy is credited to this fund and takes care of street improvements, and also for interest and a sinking fund on certain street improvement bonds."

Cross-examination:

"The City realizes on the 25¢ tax in the neighborhood of $360,000 every year."

294 (49) It was stipulated that on May 10, 1919, Armour and Company, Armour and Company of Texas, F. M. Etheridge and J. M. McCormick filed in the District Court of the 14th Judicial District of the State of Texas, on behalf of themselves and all other tax payers of the said City of Dallas, their taxpayers' bill whereby they sought an injunction against the defendants therein named, to wit: Texas & Pacific Railway Company, Walker D. Hines, Director General of Railroads, Pearl Wight as Receiver of the Texas & Pacific Railway Company, Wholesale District Trackage Company and the City of Dallas, to restrain them from carrying out the contract of August 23, 1918, made by the defendants other than the said Walker D. Hines, Director General of Railroads; and that appended to their said bill was an affidavit to the effect that all of the District Judges in the City of Dallas were taxpayers thereof and were disqualified from acting upon the bill, and therefore the said bill was presented to the Honorable Horton R. Porter, Judge of the District Court of the 68th Judicial District of the State of Texas, who indorsed upon said petition a fiat ordering said petition to be filed and the injunction as therein prayed for to be issued upon the plaintiffs entering into a bond in the sum of $10,000, conditioned and payable as required by law; that said bond was made and approved and on said May 10, 1919, an injunction was issued and served upon the City of Dallas whereby it was commanded to refrain from carrying out the said purported contract, and from giving or paying to the said Wholesale District Trackage Company the sum of $100,000 or any other sum, and to refrain from giving to the said Texas & Pacific Railway Company, or to the Receiver thereof, 40 feet off of the north side of Pacific Avenue between Griffin Street and Lamar Street in the City of Dallas. That said defendants in said bill named perfected an appeal to the Court of Civil Appeals for the 5th Supreme Judicial District of the State of Texas from the order awarding said injunction, and said cause is now pending on said appeal.

205 (50) R. V. TOMPKINS, recalled by the defendants, testified:

"I have before me the financial statement of the City of Dallas for the fiscal year beginning May 1, 1918 and ending May 1, 1919. The accounts of the City that were overdrawn are as follows:

Water works fund	$63,385.87
Street improvement fund	232,072.07
Municipal farm fund	13,982.43

Those are the only funds that were overdrawn. The City had the following credit cash balances during that period:

Interest and sinking fund	$722,903.76
General fund	104,444.66

The general fund is provided by the charter for the setting aside of certain tax levies to respective funds. In addition to that there has been from time to time special taxes voted by the people. The general fund, what we may say is the residue after these mandatory levies or charter provision levies, and these special tax votings are taken care of. That is the residue that is left of the tax. A tax levied for general purposes is one that can be used for practically any legitimate expenditure regarding the City's activities and purchase of equipment and land, and it could be used if the Board so desired to transfer it from this fund into another fund. The following other funds also show a balance:

Park fund	$9,565.54
Street lighting fund	60,387.68
Public Library fund	19,324.72
General school fund	121,905.74
High School fund	951.11

From all its funds that participated in the tax levies as of May 1, 1919, there was a net credit balance of $844,863.89, being the total of all the tax levies which had credit balances—funds participating in the tax levy which had credits except the Street Improve-
206 ment Fund, being the only fund participating in the tax levies at that time which was overdrawn at the end of the year. At the end of the fiscal year, May 1, 1919, the Street Improvement Fund was overdrawn $232,072.07. The people voted at the last election a bond issue of $1,250,000 for Street Improvement purposes. That could be applied to any legitimate improvement project.

The first time I saw the contract of August 23, 1918, by and between the City, the Texas & Pacific Railway Company and it Receivers and Wholesale District Trackage Company was in my office some two or three weeks ago and after the new administration had taken charge. I had never seen it before that time. I understand that the City of Dallas has been under an injunction since May 10, 1919, which injunction was issued out of the State court. It was

also my understanding that this cause was then pending in this court." Thereupon counsel for the City propounded this question to the witness: In view of your statement of the accounts of the City, are you ready, if the injunction is removed, to countersign that contract as Auditor? To which question and the answer designed to be elicited thereto the plaintiffs objected upon the ground that it was immaterial. The court overruled the objection and permitted the witness to answer yes, to which ruling the plaintiffs then and there duly excepted.

"The total assessed valuation of the City of Dallas for the year 1918 was $146,570,575. There is a special tax of 25¢ on the dollar provided for street improvement purposes. That applies for all of the year and it produces, based on last year's valuations, between $360,000 and $370,000. The way we make our assessments is dependent upon the valuation of the preceding year. The charter provides that all budgets shall be based on the assessed valuations of the preceding year. As a general rule the valuation increases. It has increased for the last several years."

207 Cross-examination by counsel for plaintiffs:

"I balance the Street Fund account each month. On July 1, 1918, it was overdrawn $90,016.21. On August 1, 1918, it was overdrawn $140,122.48. On September 1, 1918, it was overdrawn $173,905.66. On October 1, 1918, it was overdrawn $247,478.56. On November 1, it was overdrawn $253,847.92. On December 1, it was overdrawn $275,386.36. On February 1, 1919, it was overdrawn $156,019.71. On April 1 it was overdrawn $169,133.26. On May 1, 1919, it was overdrawn $232,072.07. It was overdrawn every months from July 1, 1918 to and including May 1, 1919, which closed the fiscal year of 1918. Of the total balances from the City from all sources derived from taxes aggregating $844,863.89 there must be deducted $722,-903.76, the amount of the interest and sinking fund or the amount to the credit of the sinking fund set aside for that purpose and which can not be devoted to any other purpose. The net balance, then, of all other funds is $121,960.13 with an overdraft in the Street Fund alone of $232,072.07, and there were overdrafts in other departments. The City budget for 1918 was approximately $1,300,000."

Redirect examination:

"In arriving at the balance of $844,000 I took the credit balances of all funds that participated in the tax levy and deducted from that the debit balances, and, deducting the sinking fund, it leaves a balance of $121,000."

Recross-examination by the solicitor for the City of Dallas:

"There was *not* an overdraft in all of the funds from July 1, 1918 to May 1, 1919. There was in practically all of them but I can not tell you definitely. That occurs every year. The fiscal year starts

on May 1st of each year. The taxes, of course, for the current year are assessable to the Assessor and Collector of Taxes on the 1st day of January—that is, they are to render for what property
208 they own at that time, on the 1st of January, and renditions are made from the 1st of January up until some time in April. The Tax Collector, of course, don't get his tax rolls up until a later period, some time along in September. The taxes are payable—as a general rule, it is provided to pay them in July, as I understand it by the charter—not by the charter, however, by the State Constitution—and the charter makes taxes delinquent on November 1st. In making up the budget and in running your City for the year, for that year, you don't get the money from your taxes, the bulk of it don't come in until December and January of the following year, and sometimes in February, depending entirely upon the time—or the extension of the payment of current taxes as is granted by the Board of Commissioners. That has varied from time to time, and is within their jurisdiction, to hold the tax money out. Now all of the funds—The General Fund having a credit balance of $104,000.00 on the 1st of May, the average monthly disbursements of the General Fund exceed $104,000.00, and unless there is some special collection made which would go to the General Fund, the General Fund would show an overdraft right at the first of the next month following.

The majority of the revenue derived by the City is from taxes. The Assessor begins assessing property between January and April and continues until he finishes his tax rolls. The rolls are then submitted to and approved by the Board of Commissioners. The time of the collection of taxes is fixed from July 1st to November 1st. Taxes became delinquent on November 1st unless the Board of Commissioners extends the time. The City government is run from January or from some time in May frequently up until in December, by borrowing money from the bank. We borrow the money from the Treasurer on his contract. That is, he cashes our warrants until the money comes in in the fall of the year and we replace it with interest. That is the way the City gov-
209 ernment is run every year. That is not the way that every city government in Texas is run. In some of them it is different. Some cities do not have the same kind of a contract we have with the Treasurer."

Recross examination:

"I hadn't balanceed the Street Improvement Fund account on June 1, 1919, as we haven't got our statements from the bank. I could not say how much it was overdrawn at that time."

(51) W. W. PEEVEY, City Secretary of the City of Dallas, testified that intervening June 30, 1915, when the hearing as to causing the Texas & Pacific Railway Company to elevate, lower or remove its tracks from Pacific Avenue was indefinitely postponed, no action of the City council or Board of Commissioners whatever was had until the passage of the resolution of August 23,

1918, authorizing the Mayor and Secretary to execute the contract between the City of Dallas, the Texas & Pacific Railway Company, its Receiver and the Wholesale District Trackage Company.

(52) Plaintiff put in evidence the charter of the Central Real Estate Company, incorporated by the State of Texas on March 18, 1913, for the purchase, sale and sub-division of real property in the City of Dallas. It was capitalized for $250,000. It was subscribed, among others, by Henry D. Lindsley, who was Mayor from about May 1, 1915, to May 1, 1917. It was also subscribed by S. J. Hay, who had also been Mayor of the City of Dallas.

(53) Plaintiff put in evidence a list of the stockholders of the Central Real Estate Company and the amount of their respective holdings, among them Fletcher F. McNeny, $2500, Henry Lindsley some $40,000 or $50,000.

210 (54) The City of Dallas put in evidence that portion of Section 1, Article X of the Charter of the City of Dallas which reads: "The term "Street Improvements" as embraced in this Article, shall include the improvement of any street, avenue, alley, highway, public place or square, or any portion thereof, within the city, by filling, grading, raising, macadamizing, re-macadamizing, paving, repairing or otherwise improving the same, or by construction or reconstruction of sidewalks, curbs and gutters, or repairing the same; and shall also include the laying out, opening, narrowing, straightening, or otherwise establishing, defining, and locating any street, avenue, public alley, square, place or sidewalk; and said term shall also include any other street improvement of a public nature and for a public benefit."

(55) The City of Dallas put in evidence Sub-division (*p*) of Article X of the Charter of the City of Dallas which reads as follows: "Where public improvements are ordered to be made otherwise than upon such petition and in the manner set forth in subsection (*o*) hereof, the cost, or part thereof, may be assessed against abutting property and its owners, as herein provided, and in such cases the Board of Commissioners may provide that for that part of the cost which may be assessed against such property and its owners, the contractor, to whom the work may be let, shall look only to such property owners and their property, and that the city shall be relieved of liability for such portion of the cost. The Board of Commissioners may also authorize assignable certificates against abutting property or property owners, or against persons, firms, or corporations using or occupying the public highways to be issued to the contractor or to the city and shall prescribe the form and terms of such certificate. The recital in such certificate that the proceedings with reference to making such improvements have been regularly had in compliance with the terms
211 hereof, and that all prerequisites to the fixing of the lien and claim of pe al liability evidenced by such certificate, have been performed, shall be prima facie evidence of the facts so recited, and no other proof thereof shall be required, but in all

courts the said proceedings and prerequisites shall, without further proof, be presumed to have been had or performed. Such certificates shall be executed by the Mayor and attested by the City Secretary, or such other officer as may be designated by the Board of Commissioners, with the corporate seal."

The above and foregoing statement of the material evidence adduced upon the trial of said cause, having been by me examined, is hereby allowed, approved and made a part of the record herein.
Dated July 14, 1919.

R. L. BATTS,
Judge Presiding.

212 *Bond on Appeal and Approval.*

Filed July 14, 1919.

Know all men by these presents: That we, Armour and Company, a private corporation duly incorporated under and by virtue of the laws of the State of New Jersey, and Armour and Company of Texas, a private corporation duly incorporated under and by virtue of the laws of the State of Texas, as principals, and the other subscribers hereto as sureties, are held and firmly bound unto the City of Dallas, a municipal corporation duly organized and incorporated under various special acts of the Legislature of the State of Texas and amendments thereto, Texas & Pacific Railway Company, a private corporation duly created by and existing under the laws of the United States of America, Pearl Wight, as sole Receiver of the said Texas & Pacific Railway Company, duly appointed and qualified as such by an order of the District Court of the United States within and for the Western District of Louisiana, Monroe Division, Wholesale District Trackage Company, a private corporation duly incorporated under and by virtue of the general laws of the State of Texas, in the full and just sum of One Thousand Dollars ($1000.00), to be paid to the said City of Dallas, the Texas & Pacific Railway Company, Pearl Wight, as Receiver of the Texas & Pacific Railway Company, and Wholesale District Trackage Company, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated this 14th day of July, in the year of our Lord one thousand nine hundred and nineteen.

213 Whereas, lately at a District Court for the Northern District of Texas, at Dallas, on the 7th day of June, 1919, in a suit depending in said court between Armour and Company and Armour and Company of Texas, plaintiffs, and the City of Dallas, Texas & Pacific Railway Company, Pearl Wight, as Receiver of the Texas & Pacific Railway Company, and Wholesale District Trackage Company, defendants, a decree was rendered against the said Armour and Company and Armour and Company of Texas, and the said Armour and Company and Armour and Company of Texas having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and having given notice in open court of an appeal to the Supreme Court of the

United States, and having perfected such appeal during the term at which said decree was rendered;

Now, the condition of the above obligation is such that if said Armour and Company and Armour and Company of Texas shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ARMOUR AND COMPANY,
By FRANCIS MARION ETHERIDGE,
Their Solicitors of Record.
ARMOUR AND COMPANY OF TEXAS,
By FRANCIS MARION ETHERIDGE,
Their Solicitors of Record.
UNITED STATES FIDELITY & GUARANTY CO.,
By JOHN SMALLMAN, [SEAL.]
Attorney in Fact,
214 *Sureties.*

Sealed and delivered in the presence of:
____ ____,
____ ____.

Approved by:
R. L. BATTS,
Presiding Judge.

215 In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2813-99. In Equity.

ARMOUR AND COMPANY et al.
vs.
CITY OF DALLAS et al.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Dallas, a municipal corporation duly organized and incorporated under various special acts of the Legislature of the State of Texas and amendments thereto, Texas & Pacific Railway Company, a private corporation duly created by and existing under the laws of the United States of America, Pearl Wight as sole receiver of the said Texas & Pacific Railway Company, duly appointed and qualified as such by an order of the District Court of the United States within and for the Western District of Louisiana, Monroe Division, and Wholesale District Trackage Company, a private corporation duly incorporated under and by virtue of the general laws of the State of Texas, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Wash-

ington, within thirty days from the date of this writ, pursuant to an appeal, duly allowed by the District Court of the United States for the Northern District of Texas, and filed in the clerk's office of said court on the 12th day of July, A. D. 1919, in a cause wherein Armour and Company, a private corporation duly incorporated under and by virtue of the laws of the State of New Jersey, and Armour and Company of Texas, a private corporation duly incorporated under and by virtue of the laws of the State of Texas, are appellants, and
216 you are the appellees, to show cause, if any, why the decree rendered against the said appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this the 14th day of July, A. D. 1919.

[The Seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

R. L. BATTS,
United States Circuit Judge Presiding over the United States District Court for the Northern District of Texas, at Dallas.

Attest with seal:
LOUIS C. MAYNARD,
Clerk of the District Court of the United States for the Northern District of Texas.

By —— ——,
Deputy.

We hereby waive the issuance of a copy of the above citation on appeal and accept service thereof, this the 24th of July A. D. 1919.

THE CITY OF DALLAS,
By JAS. J. CAREMS,
City Att'y, Counsel for City of Dallas.

PEARL WIGHT,
Receiver of The Texas & Pacific Railway Co.,
By THOMAS J. FREEMAN,
Counsel for Receiver.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By H. DE REGENES DUFOUR,
Counsel.

WHOLESALE DISTRICT TRACKAGE COMPANY,
By THOMPSON, KNIGHT, BAKER & HARRIS,
Counsel.

[Endorsed:] No. 2843-99. In Equity. Armour and Company et al. vs. City of Dallas et al. Citation. Filed 14 day of July 1919 at — o'clock — m. Louis C. Maynard, Clerk, by E. C. Van Dusen, Deputy. Etheridge, McCormick & Bromberg, Attorneys-at-Law, Dallas, Texas.

217 *Præcipe for Transcript.*

Filed July 19, 1919.

DALLAS, TEXAS, July 19, 1919.

Hon. L. C. Maynard, Clerk, U. S. District Court, Dallas, Texas.

DEAR SIR:

Kindly forthwith prepare the transcript on appeal in No. 2843 in equity, Armour and Company et al., plaintiffs vs. City of Dallas et al., defendants.

Embrace the following papers and proceedings in said transcript, to-wit:

1. Caption.

2. Bill of complaint.

3. Motion of plaintiffs for leave to file an amendment to the bill.

4. Order of June 5, 1919, granting leave to file amendment to the bill.

5. Plaintiffs' amendment to their bill.

6. Motion of Pearl Wight and T. & P., filed February 3, 1919 to dismiss the bill.

7. Order overruling said motion to dismiss.

8. Answer of defendant City of Dallas.

9. Amendment of City of Dallas to its answer.

10. Answer of defendant Wholesale District Trackage Co.

11. Answer of T. & P. and Pearl Wight, Receiver.

12. Statement of the evidence adduced upon the trial of the cause.

13. Decree of June 7, 1919, dismissing the bill and the amendment thereto.

14. Plaintiffs' prayer for and the Judge's allowance of an appeal.

15. Plaintiffs' assignments of error.

16. Appeal bond and approval.

17. Citation on appeal.

18. Acceptance of service of citation.

19. Final certificate.

Yours very truly,
ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

F. M. E.-f.

218 *Clerk's Certificate.*

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignments of error and all proceedings had in cause No. 2834/99 In Equity, wherein Armour & Company et al. are plaintiffs and the City of Dallas et al. are defendants, except that the original citation in error is included herein instead of a copy thereof, as fully as the same remain on file and of record in my office at Dallas, Texas.

In testimony whereof, witness my hand officially and the seal of said District Court, at Dallas, Texas, this the 21st day of July A. D. 1919, and of American Independence the 144th year.

[The Seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk,
By E. C. VAN DUSEN,
Deputy.

Endorsed on cover: File No. 27224. N. Texas D. C. U. S. Term No. 469. Armour & Company and Armour & Company of Texas, appellants, vs. The City of Dallas et al. Filed July 29th, 1919. File No. 27224.

EXHIBIT B.

Supreme Court of the United States.

No. 469.

ARMOUR & COMPANY and ARMOUR & COMPANY OF TEXAS, Appellants,

vs.

THE CITY OF DALLAS et al.

It is agreed by and between the parties to the above entitled and numbered cause that, during the pendency of the appeal herein, the switch tract serving Appellants' plant shall be maintained and operated, and that all other tracks on Pacific Avenue West of Appellants' plant may be removed and that all other tracks on Pacific Avenue East of Appellants' plant, not necessary for the maintenance and operation of said switch track may be removed, and that such removal shall not be held to constitute a contempt of this Court, and Appellants' prayer for injunctive relief is hereby limited to the removal of the said switch track and so much of the main track East of Appellants' plant as may be essential to the maintenance and operation of the said switch track, and further, the connections of said switch track with the main track may be changed in such a way as may best suit the convenience of the Appellees; such change, however, if made, to be so made as not to interrupt or suspend the maintenance and operation of said switch track.

Witness our hands, this the 16th day of February, A. D. 1920.

ARMOUR & COMPANY OF TEXAS,
By F. M. ETHERIDGE,
Its Solicitor of Record.
ARMOUR & COMPANY,
By F. M. ETHERIDGE,
Its Solicitor of Record.
J. L. LANCASTER,
CHARLES J. WALLACE,
Receivers for the Texas & Pacific Railway.
THE TEXAS & PACIFIC RAILWAY,
By J. L. LANCASTER.

Attest:
M. G. JAMES,
Secretary.

[Seal City of Dallas, Texas.]

THE CITY OF DALLAS,
By FRANK W. WOZENCRAFT,
Mayor.
WHOLESALE DISTRICT TRACKAGE COMPANY,
By HARRY L. SEAY,
President.

Attest:
HUGH E. PRATHER,
Secretary.

[Endorsed.]

File No. 27,224. Supreme Court U. S., October Term, 1919. Term No. 469. Armour & Co. et al., Appellants, vs. The City of Dallas et al. Stipulation of counsel and addition to record. Filed March 29, 1920.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 149.

ARMOUR & COMPANY AND ARMOUR & COMPANY OF TEXAS, Appellants,

vs.

THE CITY OF DALLAS, ET AL., Appellees.

BRIEF FOR APPELLANTS.

RALPH W. SHAUMAN,
SAMUEL B. CANTEY,
FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Armour & Company and Armour & Company of Texas, Appellants.

Francis Marion Etheridge,
Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 149.

ARMOUR & COMPANY AND ARMOUR & COMPANY OF TEXAS, Appellants,

vs.

THE CITY OF DALLAS, ET AL., Appellees.

BRIEF FOR APPELLANTS.

STATEMENT.

Appellants exhibited in the District Court of the Northern District of Texas their bill of complaint (R. 1 to 33) and their amendment thereto (R. 70), whereby they sought to enjoin the City of Dallas, hereinafter designated as the City, the Texas & Pacific Railway Company, hereinafter designated as the Railway Company, the Receivers thereof and Wholesale District Trackage Company, hereinafter designated as Trackage Company, from removing from Pacific Avenue in said

City a switch track and its necessary main track connections that serves appellants' plant.

Upon a final hearing the court, declining to pass upon one of the vital issues, dismissed appellants' bill and the amendment thereto (R. 74). Appellants seasonably perfected their appeal to this court and now here prosecute same upon the following:

SPECIFICATIONS OF ERROR.

1. The court erred in dismissing plaintiffs' bill of complaint and the amendment thereto.

2. The court erred in not awarding an injunction as prayed for by the plaintiffs in their bill of complaint and the amendment thereto.

3. Plaintiffs' bill of complaint herein and the amendment thereto sets up valuable contract rights that are protected by the obligation and contract clauses of the Constitution of the United States and shows that the resultant damage that will ensue upon the commission of the threatened violation of those contract rights is incapable of ascertainment, and therefore plaintiffs are remediless except in a court of equity, and the court erred in dismissing plaintiffs' bill of complaint herein and the amendment thereto.

4. The court erred in not awarding an injunction to restrain the defendant, the City of Dallas, from complying with the contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, because said contract is invalid for that the same was never countersigned by the Auditor of the City of Dallas, and such countersigning is an essential requisite to the validity

of the contract by the express provisions of the Charter of the City of Dallas.

5. The purported contract, a copy whereof is made Exhibit "D" to plaintiffs' bill of complaint herein, is as to the defendant, the City of Dallas, invalid because not countersigned by the Auditor of the said City, and because the Street Improvement Fund was continuously overdrawn from the date of the execution of said purported contract up to May 1, 1919, the close of the fiscal year of the said City of 1918, and therefore by the express provisions of the Charter of said City the Auditor of said City was prohibited from countersigning said purported contract, and the court erred in not so holding.

6. The Street Improvement Fund being continuously overdrawn from the date of the execution of the alleged contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, to the close of the fiscal year, May 1, 1919, the Auditor of the City of Dallas was by the express provisions of the Charter of said City prohibited from countersigning said purported contract, and after the close of the fiscal year, to-wit, May 1, 1919, said contract created an indebtedness and same was void because no provision for the payment of the hundred thousand dollars which the City of Dallas obligated itself to pay to the Wholesale District Trackage Company was provided for, and therefore said contract for the payment of said sum by the said City was void by reason of Section 5 of Article II of the Constitution of the State of Texas which provided that "no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon," and the court erred in not so holding.

7. The court erred in permitting the witness, R. V. Tompkins, Auditor of the City of Dallas, to testify that, in view of his statement of the accounts of the City, he is ready, if the injunction sued out in the State court is removed, to countersign, as Auditor, the contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, because the said R. V. Tompkins had testified that the hundred thousand dollars contracted to be paid by the defendant, the City of Dallas, to its co-defendant Wholesale District Trackage Company was chargeable to the Street Improvement Fund, and had further testified that the Street Improvement Fund account had been continuously overdrawn from the time of the execution of said purported contract up to the time the said witness testified, because by Section 42 of Article XIV of the Charter of the City of Dallas it is provided that "whenever the contract charged to any appropriation equals the amount of said appropriation, no further contract shall be countersigned by the Auditor."

8. The court erred in permitting the defendants' witness, J. E. Lee, to testify as follows: "I notified Mr. Short that my desire and policy was not to put any more tracks on Pacific Avenue; that there hadn't been any granted for some time and that it was a cherished hope of the people of Dallas some time to remove those tracks that were there," because all oral negotiations leading up to were merged in the subsequent written contract evidenced by the ordinance granted by the City of Dallas to the Texas & Pacific Railway Company, a copy whereof is made Exhibit "C" to plaintiffs' bill of complaint herein.

9. The court erred in permitting the defendants' witness, J. E. Lee, to testify as follows: "Mr. Short and

myself had a great many conversations. I couldn't recall the words, but I remember giving him that warning about the proposition. The warning was that we wanted to feel free to remove all tracks from Pacific Avenue," because all oral negotiations leading up to were merged in the subsequent written contract evidenced by the ordinance, a copy of which is made Exhibit "C" to the plaintiffs' bill of complaint herein. (R. 75 to 77.)

SUMMARY OF APPELLANTS' BILL, THE AMENDMENT THERETO AND THE UNDISPUTED EVIDENCE IN SUPPORT THEREOF.

In 1872 the Railway Company, under an ordinance of the City of Dallas authorizing it so to do, built its main line on Pacific Avenue in said City and has operated the same thereon ever since, (R. 78). By a valid ordinance approved April 14, 1890, the Railway Company, for valuable considerations, was granted the right to construct a double track on Pacific Avenue and to maintain the same for fifty years thereafter, (R. 22 to 24). (Appellants contend that the contracts evidenced by said ordinances are protected by the due process and obligation clauses of the Constitution.)

Pacific Avenue is 80 feet wide, is devoted to industrials and there are, and for years past have been, many service tracks put in and operated thereon under municipal authority. On April 4, 1912, Armour & Company of New Jersey, hereinafter designated as appellant, its co-appellant being merely a lessee of the plant hereinafter mentioned, desirous of building a plant that would be served by a switch track, conditionally contracted for the purchase of a lot on the northwest corner of Harwood

Street and Pacific Avenue. The contract of purchase was expressly conditioned upon appellant's securing from the City a franchise for a switch from the main line on Pacific Avenue to the lot in question, as well as an agreement by the Railway Company to construct, maintain and operate such switch (R. 80; 5 and 6). The officials of both the Railway Company and the City knew that appellant had contracted for said lot upon the conditions stated, (Ev. Short, R. 80 to 84). The city authorities inspected the premises and assured appellant's representative that if it would purchase the lot and dedicate certain specified portions thereof to the public for street purposes, an ordinance would be passed granting the Railway Company the right to construct and operate the desired switch track, (Ev. Short, R. 80 to 84; Ev. Jerome, R. 87). Everman, the superintendent of the Railway Company, also inspected the premises and assured appellant's representative that, in the event the franchise should be granted, the Railway Company would accept it and would construct, maintain and operate the switch track in accordance therewith (R. 87). Relying upon such assurances, appellant purchased the lot, paying $50,000 therefor, and, by deed drawn by the City Attorney, made the irrevocable dedication as required by the City as a condition precedent to the granting of the franchise (R. 82 and 83). But for such assurances appellant would not have consummated the conditional contract of purchase, and that fact was known to both the Railway Company and the City (R. 87).

In pursuance of the agreement so had by and between appellant, the City and the Railway Company, and in consideration of the irrevocable dedication so made by appellant, the City, on July 30, 1912, approved an ordi-

nance granting the Railway Company the right to construct and operate the switch track in question (R. 24 to 26). Said ordinance was granted for a period of twenty years and will not expire until July 30, 1932. Said ordinance (R. 24 to 36) proclaims the fact that the consideration therefor emanated from appellant and that it was the one to be benefited thereby.

Section 4 of said ordinance (R. 25 and 26), reads:

"That **in accordance with the agreement heretofore made between the City of Dallas and Armour & Co., the owners of a certain lot located on the north side of Pacific Avenue,** and more particularly located on the northwest corner of Pacific Avenue and Harwood Street and extending back to Live Oak Street, **which switch track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co. or the said Armour & Co. shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot where the same forms a corner of Harwood and Pacific Avenue, and shall likewise dedicate to public use for street purposes thirty-five square feet off the northeast corner of its said lot where the same forms the southwest corner of Harwood Street and Live Oak Street,** it being the purpose of the said dedication to round the corners at such points **and to dedicate such property for street purposes,** and it being understood that it requires the amount of square feet herein stated to round off said corners—all of which more fully appears from map on file in the office of the City Engineer of the City of Dallas. That the dedication of said property shall be made by the said Armour & Co., **whose property is** [to be] **served by said switch,** before the final acceptance of this ordinance by the grantee herein. That in the event the said Armour

& Co. should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and privileges granted under this ordinance, by resolution or otherwise."

The dedication deed, contemporaneous with and therefore a part of the side track ordinance, recites that it was made in **"consideration of the granting of said franchise for such switch track to the said Texas & Pacific Railway Company for the use and benefit of Armour & Company in thus providing such switch facilities to it"** (R. 82 and 83). (Appellant maintains that it is a party to said ordinance, that it paid a valuable consideration therefor by irrevocably conveying to the City a part of its said lot for street purposes, and that the tripartite contract between it, the City and the Railway Company, as evidenced thereby, is protected by the due process and obligation clauses of the Constitution.) The Railway Company accepted said ordinance, put in the switch, and thereupon appellant, encouraged so to do by both the City and the Railway Company, began and on or about February 12, 1913, completed a building on said lot at a cost of $79,692.27. Said building, consisting of a basement and three stories on Pacific Avenue and two stories on Harwood Street, is a reinforced concrete structure, monolithic in character. It is solely adapted to the peculiar requisites of appellant's business for which it was designed, and is neither adapted nor adaptable to any other kind of business. It would cost $137,870 to duplicate that building now (Ev. of Quinn, R. 86). Appellant leased the said plant to its co-appellant, Armour & Company of Texas, and the business conducted thereat has been and continues to be profitable. The annual volume

of the business is about $2,000,000. The business can not be conducted without a service track and the removal of the tracks from Pacific Avenue will put the plant out of commission, render the said building valueless and interrupt the profitable business that is being conducted thereat, and appellees know these facts (R. 87 and 88). In the conduct of its business appellant Armour & Company of Texas requires and has been and is now being furnished 600 to 650 cars per annum, (R. 87).

In disregard of the rights of appellants, appellees, upon a consideration satisfactory to themselves, voluntarily proposed the execution of a contract providing for the removal from Pacific Avenue of the main tracks and all service tracks except the one that serves Fulton Bag & Cotton Mills (R. 26 to 33). The contract so proposed was on August 23, 1918, without notice to appellants, presented to the Board of Commissioners of the City which, being in session and exercising legislative power, approved an ordinance or resolution authorizing the execution thereof by the Mayor; and, solely in pursuance of that contract, appellees, co-operating together, threaten to remove and, unless restrained from so doing, will remove from Pacific Avenue the main tracks and the switch track that serves appellants' plant (R. 85 and 86; 13 to 15). Such action on the part of the Railway Company and its Receivers is not the result of compulsion, but is solely because of their said voluntary contract (Ev. Lancaster, R. 109), and neither party to said contract, the consummation of which will necessarily strike down appellants' fixed rights, has made to either of appellants any offer or compensation whatever.

In pursuance of said ordinance or resolution of August 23, 1918, the Mayor, acting for the City, executed the said contract.

Section 42 of Article XIV of the Charter of said City (R. 79) provides that:

> "No contract shall be entered into by the Board of Commissioners until after an appropriation has been made therefor, nor in excess of the amount appropriated, and all contracts shall be made upon specifications, and no contract shall be binding upon the City unless it has been signed by the Mayor and countersigned by the Auditor and the expense thereof charged to the proper appropriation; and whenever the contract charged to any appropriation equals the amount of said appropriation no further contract shall be countersigned by the Auditor."

The contract in question provides for the payment by the City to the Trackage Company of $100,000. Said contract was not countersigned by the Auditor, and the Street Improvement Fund out of which the $100,000 was contracted to be paid was continuously overdrawn from July 1, 1918, to May 1, 1919, which closed the fiscal year of 1918 (Ev. Tompkins, R. 131), and, therefore, the Auditor could not countersign said contract without incurring criminal liability.

THE ALLEGED PUBLIC INTEREST.

Appellees seek to interpose an alleged public interest to prevent specific performance of appellants' contract rights and evidence was adduced to show that the running of through freight and passenger trains over Pacific Avenue operated detrimentally to the public. There is, however, no evidence whatever in the record to show

that the maintenance and operation of the switch track in question, with its necessary main track connections, will injuriously affect any rights of the public. The record affirmatively shows that the switch track does not cross, but lies entirely west of Harwood Street, (Ev. Tennant, R. 88), and that Harwood and Pearl and the streets intervening are the principal thoroughfares that cross Pacific Avenue, none of which are traversed by the switch track (R. 120). The contract in pursuance of which the removal of all the tracks from Pacific Avenue is threatened (R. 26 to 33) shows that the Railway Company is to run its trains over a belt line constructed by the H. & T. C. Ry. Co.

It is not the object or purpose of this suit to enjoin the Railway Company from doing that, nor to compel it to continue running its trains over Pacific Avenue. The sole object of the bill is to enjoin appellees from discontinuing or taking up the switch track west of Harwood and its necessary main track connections.

During the pendency of this cause in this court, all parties entered into an agreement on February 16, 1920, which is made a part of the record herein and which reads:

> "It is agreed by and between the parties to the above entitled and numbered cause that, during the pendency of the appeal herein, the switch track serving appellants' plant shall be maintained and operated, and that all other tracks on Pacific Avenue west of appellants' plant may be removed and that all other tracks on Pacific Avenue east of appellants' plant, not necessary for the maintenance and operation of said switch track may be removed, and that such removal shall not be held to constitute a contempt of this Court, and appellants' prayer for injunctive relief is

hereby limited to the removal of the said switch track and so much of the main track east of appellants' plant as may be essential to the maintenance and operation of the said switch track, and further, the connections of said switch track with the main track may be changed in such a way as may best suit the convenience of the appellees; such change, however, if made, to be so made as not to interrupt or suspend the maintenance and operation of said switch track."

Appellants require the switching of 600 to 650 cars per annum, or less than two cars per day, and there is no basis in the testimony (R. 77 to 137) for any contention that such restricted use of that part of Pacific Avenue whereon the switch track is located will injuriously affect the rights of the public. On the contrary, the contract expressly provides that "the spur track serving the Fulton Bag & Cotton Mills extending along the southern boundary of Pacific Avenue" shall not be removed, but shall be continued to be operated till Jan. 1, 1923, (R. 29). (Appellants, therefore, maintain that there exists no element of public interest to prevent the specific performance of their rights acquired upon a valuable consideration under the ordinance of July 30, 1912, R. 24 to 26).

The threatened removal of the tracks from Pacific Avenue is occasioned solely by what appellees deemed an advantageous contract. Lancaster, formerly the Receiver, testified: **"Yes, as a matter of fact, what was contemplated to be done is absolutely the result of contract, on which, under the circumstances, I deem advantageous to the railway company,"** (R. 109).

The Receivers of the Railway Company did not repudiate, but ratified appellants' contract with the City

for the switch track, and but for the general scheme in pursuance of what the Railway Company deemed an advantageous contract the receivers would continue the switch track service to appellants' plant. Lancaster testified: **"Of course, had there not been a program to take the main tracks off of Pacific Avenue, I would not, when I was Receiver of the Texas & Pacific Railway Company, discontinue the switch track service to the Armour plant. The proposition to take up the switch that serves Armour's plant is only incidental to the general scheme of taking up all the tracks."** (R. 112).

The City never passed any ordinance requiring the removal of any tracks from Pacific Avenue. On the contrary, the City, on April 7, 1915, cited the Railway Company to appear and participate in taking testimony as to whether a public necessity existed requiring the Railway Company to depress or elevate its tracks. On April 7 the hearing was continued to June 7, and on June 7 it was continued to June 30, and on June 30 it was continued indefinitely without action (R. 98) and no further action whatever was had by the City until the passage of the resolution of August 23, 1918, authorizing the execution of the contract between the City, the Railway Company, its Receiver and the Trackage Company (Ev. Peevey, City Secretary, R. 132 and 133). It is obvious from a perusal of the testimony (R. 78 to 134) that the scheme for the removal of the tracks from Pacific Avenue was inaugurated by real estate promoters to subserve a selfish rather than a public interest. None knew that fact better than Lancaster, formerly one of the Receivers. On

January 22, 1918, appellant wrote to Lancaster as follows:

> "We understand that there is again some agitation with regard to eliminating the railroad company's tracks from Pacific Avenue in Dallas, Texas. **Such action would ruin our investment on your rails and, we have no doubt, would be a serious damage to your company.**" (R. 110 and 111.)

On January 25, 1918, Lancaster replied to appellant, saying:

> "There has, as you know, been agitation pro and con concerning the removal of the tracks on Pacific Avenue. **This entire subject is brought about through the agitation of certain interests in Dallas.**" (R. 111.)

"Certain interests" plainly signify a selfish interest as contradistinguished from the public interest. The committee which disseminated the removal propaganda afterwards merged into the corporate existence of the Trackage Company, and in an effort to obtain funds with which to consummate the project, wired to H. L. Bromberg, on February 1, 1918, as follows:

> "Track removal project at extremely critical stage. We can't believe **property owners** will allow this plan to fail. Unless few remaining **owners** will subscribe their part, committee must admit failure, **which means enormous loss to interested property owners.**" (R. 122.)

POINT I.

The City of Dallas was expressly authorized by its charter to grant the franchise for the switch track to serve appellants' plant.

Art. II, Sub. 18 of Sec. 8, Charter of the City of Dallas, (R. 78).

POINT II.

Article I, Section 17 of the bill of rights of the Constitution of the State of Texas, providing that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof," does not authorize the repeal of an ordinance except for causes judicially ascertained.

Mayor v. Houston Street Ry. Co., 83 Tex. 548.

POINT III.

The right of control reserved by Article I, Section 17 of the bill of rights of the Texas Constitution can be exercised only by the Legislature, and has not been and can not be delegated to the City of Dallas.

City Railway Co. v. Citizens' Ry. Co., 166 U. S. 557, 563.

POINT IV.

The circumstances surrounding the grant of the switch track ordinance negative an intention on the part of the City of Dallas to give, or on the part of appellant to accept, a mere revocable right.

Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 585; Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58.

POINT V.

The reservation of the right to "amend or alter," contained in Section 2 of the switch track ordinance, does

not authorize the City of Dallas to repeal or annul the ordinance.

Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58;
C. M. & St. P. Ry. Co. v. Minnesota Central Railroad Co., 14 Fed. 525;
New Orleans v. Great Southern Telephone & Telegraph Co., 40 La. Ann. 41;
2 McQuillin, Mun. Corp., Sec. 826, pp. 1769-1770;
4 McQuillin, Mun. Corp., Sec. 1661, pp. 3494 to 3497.

POINT VI.

The proviso in Section 3 of the switch track ordinance "that in the event the said railway company shall be required to abandon, elevate or to place in subways said main tracks on Pacific Avenue, then and in that event this franchise shall be subject thereto," does not authorize the City of Dallas, acting alone or in concert with its co-appellees herein, to commit a breach of its previously existing valid contract with appellant by the voluntary removal of the tracks from Pacific Avenue.

Mattingly's Heirs v. Read, 60 Ky. 524, 526;
Kennedy v. Falde, 4 Dak. 319;
U. S. v. San Francisco Bridge Co., 88 Fed. 891, 893;
Federal Lead Co. v. Swyers, 161 Fed. 687, 692, 693.

POINT VII.

The settled rule in Texas is that a third party for whose benefit a contract is made may maintain an action to enforce it.

McCown v. Schrimpf, 21 Tex. 22;
Western Union Telegraph Co. v. Adams, 75 Tex. 531;
Mathonican v. Scott, 87 Tex. 396;
Evans v. G. C. & S. F. Ry. Co., 28 S. W. 903;

Kitchen v. Dallas Brick Co., 29 S. W. 402;
Hales v. Peters, 162 S. W. 386;
Allen v. Traylor, 174 S. W. 923;
Roberts v. Abney, 189 S. W. 1101;
T. F. & Bonding Co. v. Rosenberg School District, 195 S. W. 298.

POINT VIII.

The settled rule of decision in Texas to the effect that a third person may maintain an action on a contract made for his benefit is a fixed rule of property right which this court will follow.

Gibson v. Victor Talking Machine Co., 232 Fed. 225, 231 and 232;
Hendrick v. Lindsay, 93 U. S. 143;
National Bank v. Grand Lodge, 98 U. S. 123;
Austin v. Seligman, 18 Fed. 519;
Weldon National Bank v. Smith, 86 Fed. 398;
71 Am. St. Rep. 206, note.

POINT IX.

The rule in the Federal courts, as well as in the Texas courts, is that a third person may maintain an action on a contract when the contract shows that he furnished the consideration and that it was made for his benefit as its object.

House v. Houston Water Works Co., 88 Tex. 233;
Hendrick v. Lindsay, 93 U. S. 143;
National Bank v. Grand Lodge, 98 U. S. 123;
Willard v. Wood, 135 U. S. 309;
Constable v. National Steamship Co., 154 U. S. 51, 73 and 74;
German Alliance Ins. Co. v. Home Water Co., 226 U. S. 220, 230, 234;
Austin v. Seligman, 18 Fed. 519, 522.

POINT X.

Appellant became a party to the written contract evidenced by the switch track ordinance by its acceptance of and compliance with the requirement thereof.

Martin v. Roberts, 57 Tex. 564, 567 and 568;
Campbell v. McFadin, 71 Tex. 28, 31 and 32;
Baird v. Erie Ry. Co., 129 N. Y. S. 329;
American Malleables Co. v. Bloomfield, 83 N. J. L. 728;
Atlanta W. P. R. Co. v. Camp, 130 Ga. 1.

POINT XI.

The valid contract evidenced by the switch track ordinance is protected by the due process and obligation clauses of the Constitution, and it was not within the power of the City of Dallas thereafter to abrogate the same by the ex parte resolution of August 23, 1918.

Citizens St. R. Co. v. City Ry. Co., 56 Fed. 746; 64 Fed. 647; 166 U. S. 557;
New Orleans Water Works Co. v. Rivers, 115 U. S. 674;
Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 583, 584;
Ross v. Oregon, 227 U. S. 150, 163;
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

POINT XII.

Appellant is entitled to have its contract rights specifically enforced by the issuance of an injunction to preserve the status quo.

Owensboro v. Cumberland Telephone Co., 230 U. S. 58;
City of Emporia v. A. T. & S. F. Ry. Co., 94 Kansas 718;

Taylor v. Florida East Coast Ry. Co., 54 Fla. 635;
I. & G. N. Ry. Co. v. Anderson County, 106 Tex. 60;
I. & G. N. Ry. Co. v. Anderson County, 246 U. S. 424;
H. & T. C. Ry. Co. v. City of Ennis, 201 S. W. 256;
Harper v. Virginian Ry. Co., 76 W. Va., 788;
McKell v. C. & O. Ry. Co., 186 Fed. 39;
American Malleables Co. v. Town of Bloomfield, 83 N. J. L. 728;
Southern Ry. Co. v. Franklin & P. R. Co., 96 Va. 693;
Raphael v. Thames Valley Ry. Co., 2 L. R. Chan. App. Cas. 147;
Greene v. West Cheshire Ry. Co., L. R. 13 Eq. Cas. 44;
Jacksonville Ry. Co. v. Hooper, 160 U. S. 527;
Union Pac. Ry. Co. v. C. M. & St. P. Ry. Co., 163 U. S. 564; 600;
Atlanta W. P. R. Co. v. Camp, 130 Ga. 1;
Columbus Ry. & Power Co. v. Columbus, 249 U. S. 399.

POINT XIII.

Appellants are entitled to the undisturbed use of the building for the purposes for which it was erected and dedicated, and it is no defense to indulge the speculation that the removal of the tracks may enhance the value of the lot.

Railway Co. v. Fifth Baptist Church, 108 U. S. 317.

POINT XIV.

The City of Dallas has not, under its charter or otherwise, the right to require the Railway Company to abandon its tracks on Pacific Avenue or to remove them therefrom.

Sub. 28a, Sec. 8, Art. II, Charter of the City of Dallas (R. 78 & 79).

POINT XV.

The agreement entered into between the railway company and appellant was, at the time the receiver for the railway company was appointed, a valid and subsisting contract which fixed the obligation and determined the rights of the respective parties; and the receiver was clothed with no power to do any act which might impair the obligation of that contract.

Wolf v. McNulta, 178 Ill. 85;
Chem. Nat. Bank v. Hartford Deposit Co., 156 Ill. 522;
Same case, 161 U. S. 1.

POINT XVI.

The contract, a copy whereof is made Exhibit D to appellants' bill, in virtue of which the tracks are to be removed from Pacific Avenue, is void because not countersigned by the Auditor of the City of Dallas as required by the Charter of said City.

Sub. 42, Art. XIV, Charter, City of Dallas, (R. 79 & 80);
City of Bryan v. Page, 51 Tex. 532, 535;
Press Pub. Co. v. City of Pittsburg, 207 Pa. 623;
Lee v. City of Racine, 64 Wis. 231;
City of Superior v. Norton, 63 Fed. 357;
2 Dillon Mun. Corp., Sec. 790, p. 1177.

POINT XVII.

The resolution passed by the City of Dallas on August 23, 1918, is legislative and not administrative, and constitutes a state law impairing the obligation of the prior contract of the City with appellant, and is therefore vio-

lative of the due process and obligation clauses of the Constitution.

Citizens St. R. Co. v. City Ry. Co., 56 Fed. 746; 64 Fed. 647; 166 U. S. 557;
New Orleans Water Works Co. v. Rivers, 115 U. S. 674;
Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 583, 584;
Ross v. Oregon, 227 U. S. 150, 163;
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

BRIEF OF THE ARGUMENT.

The Railway Company's Receiver was not a party to the contract otherwise than by ratification. If the contract cannot be enforced against the Receiver of the Railway Company because he was not a party to it otherwise than by having ratified it, that fact afforded no justification for the dismissal of the bill as to those of the appellees who were parties to the contract and against whom it was enforcible. The fact that no obligation rested upon either of the appellants to continue to use the switch track is unimportant. Appellant performed its part of the contract by a dedication of parts of its lot to the public for street purposes, and the consideration appellant gave cannot be restored to it. The doctrine that a contract wanting in mutuality will not be specifically enforced has no application where the contract has been performed by the party seeking to enforce it. The doctrine of mutuality is applicable only to executory contracts. As to appellant, the contract was fully executed. 25 R. C. L., title, "Specific Performance," Section 36, p. 235, bottom paging, and authorities cited.

The contract evidenced by the switch track ordinance contravened no provision of the Texas Constitution or

statutes and is not subject to such arbitrary annulment as was undertaken by the City by the resolution of August 23, 1918, authorizing the Mayor to execute a contract, the necessary effect of which was to strike down appellants' vested rights acquired in good faith and upon a valuable consideration. Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 585.

The granting of the switch track ordinance, the acceptance thereof by the Railway Company and appellant's dedication deed are all parts of one and the same transaction and as such must be construed together. Baird v. Erie Ry. Co., 210 N. Y. 225.

The fact that appellant paid the consideration for the switching privileges gives it direct rights under the switching contract as being in effect and in law a direct party to that agreement. Baird v. Erie Ry. Co., 129 N. Y. Supp. 329, 343.

The formal or immediate parties to a contract are not always the persons who have the most substantial interest in its performance. Sometimes a third person is exclusively interested in its fulfilment. If the parties choose to treat him as the primary party in interest they recognize him as a privy in fact to the consideration and promise. Austin v. Seligman, 18 Fed. 519, 522.

There is a manifest distinction between covenants to establish and maintain stations for the public convenience and those to establish and maintain sidings for private use merely. The former are generally condemned as against public policy, while the latter are to be governed by the circumstances of each particular case. Whalen v. Baltimore & Ohio R. R. Co., 108 Md. 11, 18 & 19.

The contract of a railway company to construct and maintain a side track or switch for the benefit of a private

person is not against public policy when the interests of the public are not thereby injuriously affected. Taylor v. Florida East Coast R. R. Co., 54 Fla. 636; Butler v. Tifton, T. & G. R. Co., 121 Ga. 817; Scholton v. St. Louis & S. F. R. Co., 101 Mo. App. 516; Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1; Green v. West Cheshire Ry. Co., L. R. 13 Eq. Cas. 44.

The subject matter of the contract evidenced by the switch track ordinance was not foreign to the lawful purposes of the Railway Company and the ordinance was granted in the exercise of express charter powers of the City, and it is not forbidden by statute, is not otherwise illegal and should not be annulled by the courts. Taylor v. Florida East Coast R. Co., 54 Fla. 635, 649.

The burden devolved upon the appellees, in order to prevent specific performance of the contract relied upon by appellant, to establish satisfactorily that there had arisen such a conflict between the public duties of the Railway Company on one hand, and its duties under the contract on the other, as to make it impossible for it to discharge the former without entirely abandoning the latter. Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1.

Appellees signally failed to discharge that burden. The material evidence upon that issue is that of Lancaster, R. 102 to 114. Lancaster's evidence is to the effect that Pacific Avenue ascends eastward at the rate of 1.4 feet per 100 feet; that to get heavy trains over that grade they must be run at an excessive rate of speed; that more than a hundred trains are operated every twenty-four hours; that the freight trains are very long, some of them having from 70 to 80 cars, and that they are frequently stopped, obstructing the traffic, etc. (R. 105.) Such is the sum and substance of the testimony relative to the

issue of the public interest sought to be interposed between appellants' obligation and the remedy to which it is entitled.

Inasmuch as it is not the purpose of the bill to enjoin the Railway Company from running its trains over the belt line of the H. & T. C., and inasmuch as the sole purpose of the bill is to enjoin the appellees, confederating together, from taking up the switch track serving appellants' plant and its necessary main track connections, the testimony of Lancaster is wide of the mark.

The fact, if it be a fact, that the continued use of Pacific Avenue by the Railway Company by the running of a hundred heavy trains over it every twenty-four hours is incompatible with the safety and convenience of the public, constitutes no answer to the proposition that the restricted use of Pacific Avenue by the maintenance and operation of the switch track serving appellants' plant will not operate injuriously upon the public interest. There is not a scintilla of evidence in the record showing or tending to show that such restricted use of Pacific Avenue will in the least interfere with the safety or convenience of the public. Such being the state of the record, it is not conceivable that appellant should be denied appropriate remedy for the enforcement of its legitimate contract, protected, as it is, by the due process and obligation clauses of the paramount law. It is obvious that the damages incident to the removal of the switch track, which must necessarily result in rendering appellants' plant valueless and in terminating the conduct of its profitable business, are incapable of ascertainment. Appellants' equities are very great. "It contracted for the lot upon the express condition that it would not complete the purchase unless it could obtain from the City a

franchise for a switch track and an agreement from the Railway Company to accept such franchise and put in and operate the switch track. The City and the Railway Company knew this fact. The officials of both inspected the premises and those of the City assured appellant that if it would go forward with and complete its contract of purchase and irrevocably dedicate to the public for street purposes certain portions of its lot, the franchise would be granted, and the Railway Company assured appellant that in the event of the grant of the franchise it would accept the same and would put in and operate the switch track in accordance therewith. Acting upon such assurances, appellant consummated the purchase of the lot, paid $50,000 therefor and proceeded, being encouraged so to do both by the City and the Railway Company, to the construction and completion, at great expense, of a plant adapted solely to the peculiar requisites of its business. That plant cannot be operated without a service track. Thereafter the city, confederating with the Railway Company, by the ex parte ordinance of August 23, 1918, undertook to authorize the Railway Company to remove all its tracks from Pacific Avenue, including the switch track serving appellants' plant, thereby attempting to strike down, without notice or any sort of offer of compensation, the fixed and vested rights of appellant that were confessedly within the purview of the sacred protection of constitutional guaranties. Such proceeding was not only illegal, but is shocking to the conscience.

Appellees attempt to justify, or rather to escape the consequences of, the illegal act upon several pretenses. The first pretense is that of public policy, and that finds no support whatever in the record as applied to the limited use appellant seeks to make of Pacific Avenue. The

next pretense is that section 2 of the switch track ordinance reserves to the City the right at all times to "amend or alter the ordinance". The right to "amend or alter" does not include the right to strike down or destroy. If any such unreasonable intention lurked in the minds of the council that passed the ordinance, it came under the obligation of expressing it clearly and unambiguously. That pretense therefore utterly fails. Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 72; Chicago, M. & St. P. Ry. Co. v. Minnesota Central Ry. Co., 14 Fed. 525, 530; City of New Orleans v. Great Southern Telephone & Telegraph Co., 40 La. Ann. 41. The next pretense is that section 3 of the switch track ordinance provided that should the Railway Company "**be required to abandon**" its tracks on Pacific Avenue "then and in that event this franchise shall be subject thereto". Obviously this provision is wholly inapplicable because it is an undisputed fact that the City never attempted to require—much less did it ever require—the Railway Company to abandon its tracks on Pacific Avenue. At one time the City cited the Railway Company to appear and participate in a hearing to determine whether public policy required the tracks on Pacific Avenue to be depressed, elevated or removed, but that proceeding was entirely abandoned, presumably because the City determined that public policy required neither. The concluding clause of section 4 of the switch track ordinance, quoted pp. 7 and 8, *supra*, provides "**that in the event the said Armour & Company should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and privileges granted under this ordinance by resolution or otherwise**". The specification of one contingency which alone authorized

the City to repeal the ordinance, necessarily excluded the right to repeal it upon the happening of any other contingency. This follows under the settled maxim of *expressio unius est exclusio alterius.* This proviso contained in section 3 of the ordinance has no application because the threatened abandonment of Pacific Avenue is purely voluntary and is in pursuance of what the parties, adverse to the interests of appellant, deem advantageous to themselves. That fact was proclaimed by Lancaster when he testified: "**Yes, as a matter of fact, what was contemplated to be done is absolutely the result of contract, on which, under the circumstances, I deem advantageous to the Railway Company**" (R. 109). It is not permissible to import into the ordinance—a tripartite agreement among appellant, the Railway Company and the City—a material condition such as that it shall terminate in the event of a voluntary abandonment of the street by the Railway Company under legislative permission from either the City or the State. Such interpolation of material terms not found in the contract does violence to the established canons of construction.

The City has not and never had power to require the Railway Company to abandon its tracks on Pacific Avenue. Its power is expressly restricted by Subdivisions 28 and 28a of Section 8 of Article II of its Charter (R. 78 & 79). Thereby the power of the City is restricted to the right to require railway companies operating tracks across public streets "to reduce such track or tracks below the level of the streets intersected or occupied by such track or tracks, or to elevate such track or tracks above the level of the streets intersected or occupied by such track or tracks, and to require the company or companies owning or operating such track or tracks to

provide necessary and proper crossing for the public travel at intersecting streets" (R. 79).

The police power cannot lay hold of mere inconvenience and make it the basis of the right to repeal the switch track ordinance. Grand Trunk Western Ry. Co. v. City of South Bend, 227 U. S. 544, 554.

None of the defenses interposed to the relief prayed for by appellant, and especially as against the City, the Railway Company and the Trackage Company, can pass the test of judicial scrutiny.

The purported contract, the execution of which was authorized by the ex parte resolution of August 23, 1918, is absolutely void because not countersigned by the City's Auditor. Subdivision 42 of Article XIV of the City's Charter provides that: "No contract shall be entered into by the Board of Commissioners until after an appropriation has been made therefor, nor in excess of the amount appropriated, and all contracts shall be made upon specifications, and no contract shall be binding upon the City unless it has been signed by the Mayor and countersigned by the Auditor" (R. 79). It is an undisputed fact that the contract was not countersigned by the Auditor, and it is a further undisputed fact that the $100,00 which the purported contract obligated the City to pay was to be paid from the Street Improvement Fund and that that fund was continuously overdrawn during every month from July 1, 1918, to and including May 1, 1919, and there never was, therefore, a time when the Auditor could legally countersign that purported contract. (R. 130 to 132.) The authorities cited under point XVI are conclusive of the question.

The District Court evaded and refused to decide that issue on the ground that a taxpayers' suit had been brought in the State court by a number of taxpayers, including appellants, for the use and benefit of themselves and all other taxpayers of the City, to enjoin appellees from carrying out the contract of August 23, 1918, and because a temporary injunction had issued in that case (R. 74). Upon that issue the appellees were deprived of a hearing and that fact distinctly appears upon the face of the decree dismissing their bill, (R. 74). The proceeding in the State court was not one *in rem* and it afforded no justification for the abrogation by the court below of its constitutional function.

It is respectfully submitted that the decree of the court below should be here reversed.

RALPH W. SHAUMAN,
SAMUEL B. CANTEY,
FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Armour & Company and Armour & Company of Texas, Appellants.

Francis Marion Etheridge,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 149.

ARMOUR & COMPANY, AND ARMOUR & COMPANY OF TEXAS,

Appellants,

versus

CITY OF DALLAS, THE TEXAS & PACIFIC RAILWAY COMPANY, PEARL WIGHT, AS RECEIVER OF THE TEXAS & PACIFIC RAILWAY COMPANY, AND WHOLESALE DISTRICT TRACKAGE COMPANY,

Appellees.

Brief for The Texas & Pacific Railway Company and Pearl Wight, Receiver of The Texas & Pacific Railway Company, Appellees.

THOMAS J. FREEMAN,
Solicitor for Appellees.

Hauser Printing Co., "The Legal Printers," 720 Poydras St., N. O., La.

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STATEMENT.

This is an appeal by the appellants, Armour & Company and Armour & Company of Texas, plaintiffs in the Court below, from a decree of the United States District Court for the Northern District of Texas, made on June

7, 1919, in favor of the defendants below and dismissing plaintiffs' bill. (See page 74 of the printed record.)

The cause was tried by the District Court upon the bill, answer of all of the defendants, and proof upon part of both plaintiffs and defendants.

The appellants in their bill sought an injunction to prevent The Texas & Pacific Railway Company, and its Receiver, from executing a contract with the City of Dallas and the Wholesale District Trackage Company to remove, and from removing, tracks of The Texas & Pacific Railway Company over and along Pacific Avenue in the City of Dallas, Texas, including a switch or industry track serving the plant of the appellants herein, the appellants contending that the removal of the tracks will destroy the use of the industry track constructed to serve the plant of the appellants which plant is adjacent to the main line tracks of The Texas & Pacific Railway Company on Pacific Avenue in the City of Dallas.

The pleadings and evidence in this proceeding disclosed in substance the following facts:

That, for many years prior to 1912, The Texas & Pacific Railway Company had and used tracks on Pacific Avenue in the City of Dallas, its authority to do so being conferred by municipal ordinances.

In July, 1912, the City Council of the City of Dallas passed an ordinance granting to The Texas & Pacific Railway Company the right and privilege to construct a switch track on Pacific Avenue, the location of the track being designated and defined in the ordinance. The purpose of this track was to serve the plant of Armour & Company of Texas. The ordinance under which this industry track was constructed contained provisions as follows:

"Sec. 2. That the right, privilege, and franchise hereby granted is granted subject to the city charter of the City of Dallas, and such future charters and ordinances as may hereafter be passed, and the city expressly reserves the right to at all times amend or alter the ordinance hereby granted.

"Sec. 3. That the right and privilege hereby granted is granted for a period of twenty years from the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific Avenue, then in that event this franchise shall be subject thereto, and the said grantee shall, during said time, pay, on the second day of January in each and every year, the sum of ten dollars per year, as a bonus for the right, privilege, and franchise hereby granted: provided that ten dollars shall be paid for the year 1912.

"Sec. 4. That in accordance with the agreement heretofore made between the City of Dallas and Armour & Co., the owners of a certain lot located on the north side of Pacific Avenue, and more particularly located on the northwest corner of Pacific Avenue and Harwood Street, and extending back to Live Oak Street, which switch track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co., or the said Armour & Co., shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot, where the same forms a corner of Harwood and Pacific Avenue and shall likewise dedicate to public use for street purposes thirty-five square feet of the northeast corner of its said lot, where the same forms the southwest corner of Harwood street and Live Oak

street; it being the purpose of the said dedication to round the corners at such points and to dedicate such property for street purposes, and it being understood that it requires the amount of square feet herein stated to round off said corners, all of which more fully appears from map on file in the office of the city engineer of the City of Dallas. That the dedication of said property shall be made by the said Armour & Company whose property is served by said switch, before the final acceptance of this ordinance by the grantee herein.

"That in the event the said Armour & Co., should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and privileges granted under this ordinance, by resolution or otherwise."

The Tracks of The Texas & Pacific Railway Company traverse the City of Dallas from its extreme Eastern boundary to its extreme Western boundary, running through the heart of the business district of the City of Dallas, the City of Dallas being located North and South of its tracks.

That, as a result of the growth of the City of Dallas since the Railway Company commenced to use Pacific Avenue for its tracks, there has been great increase, both of railway and other traffic on that street, and of other traffic along streets crossing Pacific Avenue in the locality of the industry or switch track serving of Armour & Company's plant.

Pacific Avenue divides the principal residence section of the City from its principal retail and shopping districts. The Tracks on Pacific Avenue are within a very short distance of the leading retail district and the most used thoroughfare of the city.

On account of the location of the tracks on Pacific Avenue, and the great number of trains passing over same daily, traffic is greatly congested and the public interest and safety demanded either the raising or lowering of these tracks, or the removal of them from Pacific Avenue.

This situation had existed quite a time prior to 1912, the date of the ordinance authorizing the construction of the industry track to Armour & Company of Texas' Plant, and the matter of removing the tracks from Pacific Avenue had been agitated long before this ordinance was passed and was continuously agitated thereafter. (See F. McNeny's testimony, page 117-119 of the printed record.)

There was evidence to support the conclusion that it was impracticable to lower the tracks because the lowering of them to the required depth would subject them to overflow by the Trinity River; that the elevation of the tracks was impracticable on account of the enormous expense, and the destruction of the various tracks serving the industries along Pacific Avenue at Grade. (See testimony of J. L. Lancaster, page 102-107 of printed record.)

The situation became so acute that after repeated negotiations with the City of Dallas, The Texas & Pacific Railway Company and the City of Dallas, in connection with the Wholesale District Trackage Company, agreed on the 23rd day of August, 1918, upon a contract for the removal of the tracks from Pacific Avenue, which contract, among other things, provided the means by which The Texas & Pacific Railway Company and its Receivers could operate its trains through the City of Dallas at a point where its operation would not be a continuing nuisance and a menace to life and property.

The carrying out of this contract will result in the removal of the tracks of The Texas & Pacific Railway Com-

pany from Pacific Avenue, and will prevent the operation of its trains along Pacific Avenue, and the use of the industry track serving Armour & Company of Texas' Plant

After this contract had been agreed upon and signed, Armour & Company and Armour & Company of Texas instituted this suit to enjoin the carrying out of same, alleging, in substance that it would destroy the use of said industry track serving their plant, and to a large degree destroy the value of their plant. (See pages 1 and 19 of the printed record.)

The Texas & Pacific Railway Company answered the complaint of Armour, denying many of the allegations of the bill, and pleading specially that the ordinance under which Armour's industry track was constructed provided that it might be removed in the event The Texas & Pacific Railway Company should abandon or elevate its tracks on Pacific Avenue.

It further plead that said industry track was put in subject to the right of the City at any time to have same removed; that at all times it was subject to the right of the city, in the exercise of reasonable police regulations, to remove same and cancel the ordinance; that the safety of the lives of the public required that the tracks on Pacific Avenue should be removed; that Armour & Company had no vested rights or any contractual obligations that would be impaired by this removal; that they constructed their plant with the full knowledge of the right of the city to remove said industry track at any time it saw proper; that there was no obligation upon the part of The Texas & Pacific Railway Company to maintain said track for any period of time, and that the necessities and safety of the public required that the tracks both main and industry of The Texas & Pacific on Pacific Avenue should be changed, and

that the contract between The Texas & Pacific Railway Company, its Receivers, and the City of Dallas, to this end, was valid, and that Armour & Company had no right to interfere with its execution. (See pages 43-58 of the printed record.)

The contract is exhibited to the bill of complaint herein, and is to be found on page 26 of the record.

In addition to other allegations in appellants' bill, attacking the right of defendants herein to make said contract with the City of Dallas, the appellants attack the legality of said contract because it exceeds the charter powers of the defendant, the City of Dallas, to enter into said contract, upon the ground that it provides for the payment of One Hundred Thousand Dollars by the City of Dallas, and that no appropriation had been made with which to liquidate said sum, and, further, that said contract had not been properly executed by the City Auditor.

Among other testimony, introduced at the trial, was the following stipulation:

> "It was stipulated that on May 10, 1919, Armour and Company and Armour and Company of Texas, F. M. Etheridge and J. M. McCormick filed in the District Court of the 14th Judicial District of the State of Texas, on behalf of themselves and all other taxpayers of the City of Dallas, their taxpayers' bill hereby they sought an injunction against the defendants therein named, to-wit: Texas & Pacific Railway Company, Walker D. Hines, Director General of Railroads, Pearl Wight, as Receiver of The Texas & Pacific Railway Company, Wholesale District Trackage Company, and the City of Dallas, to restrain them from carrying out the contract of August 23, 1918, made by the defendants other than the said Walker D. Hines, Director General of Rail-

roads; and that appended to their said bill was an affidavit to the effect that all of the District Judges in the City of Dallas were taxpayers thereof and were disqualified from acting upon the bill, and therefore the said bill was presented to the Honorable Horton B. Porter, Judge of the District Court of the 66th Judicial District of the State of Texas, who endorsed upon said petition a fiat ordering said petition to be filed and the injunction as therein prayed for to be issued upon the plaintiffs entering into a bond in the sum of $10,000, conditioned and payable as required by law; that said bond was made and approved and on said May 10, 1919, an injunction was issued and served upon the City of Dallas whereby it was commanded to refrain from carrying out the said purported contract, and from giving and paying to the said Wholesale District Trackage Company the sum of $100,000, or any other sum, and to refrain from giving to the said Texas & Pacific Railway Company, or to the Receiver thereof, 40 feet off of the north side of Pacific Avenue between Griffin Street and Lamar Street in the City of Dallas. That said defendants in said bill named perfected an appeal to the Court of Civil Appeals for the 5th Supreme Judicial District of the State of Texas from the order awarding said injunction, and said cause is now pending on said appeal." (See printed Record p. 129.)

After hearing all the pleading and the evidence the court below refused the injunction, and handed down a decree in the following terms:

> "On this the 7th day of June, A. D., 1919, came regularly on to be heard the above entitled and numbered cause, and the court having heard the pleadings, evidence and argument of counsel, is of the opinion that the law is with the defendants.

"It appearing to the court, however, that as the issue presented by paragraph 22 of the Bill of Complaint, and by the Amendment to the Bill, was presented to the District Court for the 66th Judicial District of Texas, in a taxpayer's suit brought by complainants herein and others for the use and benefit of themselves and all other taxpayers of the City of Dallas, and transferred to and now pending in the District Court for the 14th Judicial District of the State of Texas, numbered 30895-A and entitled '*Armour & Co., et al., vs. The City of Dallas, et al.,*' and that therein complainants and their co-plaintiffs therein upon *ex parte* hearing, obtained a temporary injunction restraining the defendants herein, who are the defendants herein, from carrying out the contract of August 23, 1918, by and between City of Dallas, Wholesale District Trackage Company, Texas & Pacific Railway Company and Pearl Wight, as Receiver of The Texas & Pacific Railway Company, which matter of injunction is pending on appeal by such Defendants to the Court of Civil Appeals for the 5th Supreme Judicial District of Texas, at Dallas, this Court is of the opinion that it ought not to grant relief on account of such issue;

"It is, therefore, ordered, adjudged and decreed by the court that the plaintiffs' original bill of complaint, and the amendment thereto, be, and the same are hereby, dismissed at the cost of the plaintiffs. The plaintiffs thereupon duly and in open court excepted and gave notice of appeal to the Supreme Court of the United States." (Printed Record p. 74.)

"Dated June 7, 1919.

R. L. BATTS,
Judge Presiding."

It is from this decree that the appellants are appealing.

In connection with this case, I would further submit for consideration to the court that on the 1st day of March, 1918, in the District Court of the United States for the Western District of Louisiana, in cause No. 1120, Equity, entitled *"B. F. Bush, Receiver, etc., vs. The Texas & Pacific Railway Company,"* in which Pearl Wight and J. L. Lancaster had been appointed Receivers, the appellants in this cause filed their plea of intervention against The Texas & Pacific Railway Company and Pearl Wight as Receiver of The Texas & Pacific Railway Company alleging the same identical facts which are set forth in this cause, and seeking the same identical relief that they are seeking in this cause, with the same identical issues that are involved in this cause, and with the same identical parties, except that the City of Dallas and the Wholesale District Trackage Company were not made parties.

The relief sought in that intervention is founded on the same facts as is the relief sought in this cause, and the essential bases of the relief sought in that cause and that sought in this cause are the same.

This intervention was tried in the District Court of the United States for the Western District of Louisiana and on the 9th day of December, 1918, a decree was handed down denying the relief sought therein which was identical with the relief sought in this cause.

This intervention was, in due course, appealed by the plaintiffs therein, who are the appellants in this cause, to the Circuit Court of Appeals for the 5th Circuit, and on May 5, 1919, the Circuit Court of Appeals for the 5th Circuit handed down its opinion, affirming the opinion of the District Court. This case is reported in 258 Federal Reporter, 185.

From the decree of the Circuit Court of Appeals for the 5th Circuit, the appellants herein filed in this Court their petition for writ of certiorari which writ was contested by The Texas & Pacific Railway Company and by Pearl Wight, the then Receiver of The Texas & Pacific Railway Company. Said petition for writ of certiorari was No. 466 on the Docket of this Court and entitled "Armour & Company and Armour & Company of Texas, vs. The Texas & Pacific Railway Company and Pearl Wight, Receiver of The Texas & Pacific Railway Company." This petition came on to be heard by this Court and on November 17, 1919, this Honorable Court handed down its decision by which it ordered that said petition for writ of certiorari be denied. (See printed record in cause No. 466, October Term, 1919, of this Court.)

The plea of intervention in said cause was submitted on the petition of the intervenors, the appellants in this cause, the answer of The Texas & Pacific Railway Company and the Receiver of The Texas & Pacific Railway Company, which is substantially the answer in this cause, and upon evidence introduced upon the part of intervenors, the appellants in this cause, and The Texas & Pacific Railway Company and the Receivers of The Texas & Pacific Railway Company, said evidence being substantially the evidence introduced in this cause.

In said application for certiorari, and, as one of the grounds for same, these appellants stated as follows:

> "Because this cause should be brought to this court and be consolidated with the cognate cause of *Armour and Company, et al.*, appellants, *vs. City of Dallas, et al.*, appellees, now pending in this court on appeal."

ARGUMENT.

The primary and sole purpose of appellants in this cause, as evidenced by their bill is to restrain the City of Dallas and The Texas & Pacific Railway Company from entering into and carrying out the contract dated August 23, 1918, Exhibit D to appellants' bill, the basis of attack upon said contract being that the city had no authority to make same, in view of the ordinance authorizing the construction of the industry track to Armour and Company's plant, and that the carrying out of said contract would destroy said industry track to said Armour and Company's plant, and that the carrying out of said contract and the removal of said track would, in effect, deprive appellants of their property without due process of law, and in violation of the prohibition against any state passing a law impairing the obligation of contracts.

The appellees respectfully submit that said contract is valid in all of its terms and conditions and that the City of Dallas, The Texas & Pacific Railway Company and the Receiver of The Texas & Pacific Railway Company had full authority to make same, and that the appellants herein have no right whatsoever that they are entitled to have protected under said contract, and, in support of their contention, they submit the following propositions of law and statement of facts.

I.

It is undisputed that the City of Dallas, being incorporated under a special charter, had full authority and right to pass reasonable police regulations. (See Charter, City of Dallas, Sec. 1, Art. 2, page 89 of the record.)

(a) A city incorporated under a special charter has

the authority to pass reasonable police regulations necessary to secure the public safety.

Northern Pacific Ry. Co. vs. Duluth, 208 U. S. p. 583. (Cited and approved in case of *Great Northern Railway vs. Clara City*, 246 U. S. p. 437.)

(b) The City of Dallas had the right to require the railway company to lower or elevate its tracks, or to make any other arrangements concerning said tracks so as to make their use reasonably safe and convenient for public use.

C. I. & W. Ry. vs. Cornersville, 218 U. S. p. 336.
Northern Pacific Ry. vs. Duluth, 208 U. S. p. 583.
Great Northern Ry. vs. Clara City, 246 U. S. p. 437.

(c) Although the City of Dallas could not require The Texas & Pacific Railway Company to abandon its tracks on Pacific Avenue, and remove them therefrom, (see case *Grand Trunk Western Railway vs. South Bend*, 227 U. S. p. 553), this would not prevent The Texas & Pacific Railway Company and the City of Dallas from agreeing that the tracks might be removed from a portion of Pacific Avenue and shifted to some other portion of the City.

(d) The Texas & Pacific Railway Company, under Section 5 of its Charter (Acts of Congress of the United States, March 3, 1871, Ch. 122, 16th Statutes at Large), had the right to make a trackage agreement with other lines, and it appears in this record that The Texas & Pacific Railway Company has made an agreement with the Houston & Texas Central Railroad Company by which its tracks can be shifted from Pacific Avenue and its trains brought

over the line of the Houston & Texas Central Railroad Company instead of over Pacific Avenue. (See page 29 of the printed record.)

(e) The police powers vested in municipalities or legislative bodies cannot be bartered or sold so as to prevent their exercise by future city councils or legislative authorities. See following authorities:

Leisey vs. Hardin, 135 U. S. p. 127, 128, 129, 131.
Fertilizer Co. vs. Hyde Park, 97 U. S. p. 659.
C. B. & Q. Rwy. vs. Chicago, 166 U. S. p. 166, 226, 255.
Great Northern Ry. vs. Clara City, 246 U. S. p. 437.

(f) The police power of a city or a municipality, under a special charter, cannot be contracted away, and the uncompensated obedience to laws passed in its exercise does not contravene the Federal Constitution.

Northern Pacific Ry. vs. Duluth, 208 U. S., p. 583, cited and approved in
Great Northern Ry. vs. Clara City, 246 U. S. p. 437.
St. P. M. & M. Ry. vs. Minneapolis, 214 U. S. p. 497.
C. M. & St. P. Ry. vs. Minneapolis, 232 U. S. p. 430.

(g) It is well settled that in the exercise of its police powers a city may require a railway company to lower or elevate its tracks so as to have a separation of grades, and this too at the entire expense of the Railway Company.

C. B. & Q. Ry. vs. Nebraska, 107 U. S. 57.

(h) It is also well settled that all franchises granted by cities are subject to the power of the municipality to pass reasonable police regulations necessary to secure the public safety.

Northern Pacific Ry. vs. Duluth, 208 U. S. p. 583, cited in *Grand Trunk Ry. vs. South Bend*, 227 U. S. p. 553.

None of these authorities hold that a city by the exercise of a police regulation can deprive a railway company of a franchise once granted, but these authorities hold that the use of a franchise may be regulated so as to preserve the current rights of the public and the company.

Grand Trunk Ry. vs. South Bend, 227 U. S. p. 553.

The City of Dallas could not require The Texas & Pacific Railway Company to abandon its franchise through the City of Dallas, even though this was in the exercise of a police regulation, as the franchise possessed by The Texas & Pacific Railway Company from the City of Dallas is a contract and its use could not be impaired or taken away from The Texas & Pacific Railway Company even by virtue of the exercise of a police regulation (see case *Grand Trunk Railway vs. South Bend*, 227 U. S. p. 553), but the use of its franchise may be regulated, and the Company and the City may agree upon the nature of this regulation.

(i) A Receiver, in the exercise of his sound discretion, may abrogate contracts made by the Company prior to the Receivership, and no action for damages will lie against the Receiver for such breach.

Brown & Sheldon vs. Warner, 78 Texas Supreme Court, p. 543.

II.

In this case the appellants are seeking the aid of a court of equity to enforce specific performance of an alleged contract between appellants, The Texas & Pacific Railway Company and the City of Dallas for the maintenance and operation of a switch track in the City of Dallas, serving the plant of Armour & Company of Texas.

Appellees respectfully submit the following propositions and authorities:

(a) There is no statute, either state or federal, requiring a railway company to maintain either perpetually or for any length of time industry tracks. There being no such specific duty imposed by statute, a court of equity will not lend its aid and require specific performance of such an arrangement where the party complaining has an adequate and complete remedy at law.

Northern Pacific Ry. vs. Territory of Washington, 142 U. S. p. 492, 509.

(b) A court of equity will not order a railway company to maintain a spur or industry track contrary to public interests and contrary to the exercise of a reasonable police regulation.

Texas & Pacific Ry. vs. Marshall, 136 U. S., p. 393.

Beasley vs. Texas & Pacific Ry., 191 U. S., p. 497 of Opinion.

Northern Pacific vs. Territory of Washington, 142 U. S., pp. 492, 509.

Texas & Pacific Ry. vs. Scott, 77 Fed. 726.

Armour & Co. et al. vs. Texas & Pacific et al., 258 Fed. 185.

If Armour & Company had a valid contract with The Texas & Pacific Railway Company and the City of Dallas for the construction and maintenance of the industry track serving their plant, and the City of Dallas and The Texas & Pacific Railway Company breached said contract, a court of equity would not enforce the specific performance of same, but would relegate the appellants to an action at law for damages, leaving the railroad company and the city at liberty to follow the course which their best interests and those of the public demanded.

Texas & Pacific vs. Marshall, 136 U. S., p. 393.
Beasley vs. The Texas & Pacific, 191 U. S., p. 497 of Opinion.
Northern Pacific Ry. vs. Territory of Washington, 142 U. S., pp. 492, 509.
Texas & Pacific Railway vs. Scott, 77 Fed. p. 726.
Armour & Co. et al. vs. Texas & Pacific et al., 258 Fed. 185.

In the last case cited of *Armour & Company et al. vs. The Texas & Pacific Railway Company et al.*, the plaintiffs in that case and the plaintiffs in this cause are the same identical plaintiffs, and the defendants, The Texas & Pacific Railway Company, and its Receiver, are the same identical defendants; the issues raised in that case are the same issues that are raised and involved in this cause, to-wit: to prevent the execution of a contract between the City of Dallas and The Texas & Pacific Railway Company and its Receiver, dated August 23, 1918; the same identical relief was sought in that case as is sought in this case, and the same questions were involved in that case as are involved in this case in fact, as was alleged by the appellants

therein in their application for writ of *certiorari*, the case in 258 Federal Reporter and this case are designated as "cognate causes."

In said cause the Circuit Court of Appeals for the 5th Circuit held that:

> "Though meat-packing companies, acquiring valuable abutting property adapted to their business, have a contract or property right to prevent removal from a street of an industry track serving them, they cannot have relief by injunction against the city, the railroad company and a trackage company to restrain removal of the track to another street, when it appears that paramount public interests may be interfered with by granting relief, especially where there is no convincing showing of a lack of legal remedy for damages."

(d) It is not claimed that the switch track serving Armour's plant was paid for by Armour & Company of Texas or Armour & Company of New Jersey, or owned by either of them, nor was there any corresponding obligation upon either Armour & Company of Texas or Armour & Company of New Jersey; in fact, they could abandon same at any time they saw proper, and remove their plant at any time they saw proper.

The Receiver of The Texas & Pacific Railway Company was not a party to the alleged contract in any wise and to enjoin him from removing a switch track would amount to requiring specific performance by him of a contract to which he is not a party. Under such conditions a court of equity will not enforce specific performance of such an agreement.

Armour & Co. et al. vs. Texas & Pacific et al.,
258 Fed. 185.

III

Under the laws of the State of Texas railway companies under certain conditions may abandon and re-locate their line after it has once been located.

See Act 35th Legislature, State of Texas, 1918, pages 45, 47 and 196;

Also see Act 35th Legislature, State of Texas, 1918, page 196,

conferring power on the Railroad Commission of Texas to require railroads to arrange or relocate tracks when public safety may require it.

The Texas & Pacific Railway Company obtained authority from the Railroad Commission of Texas for the abandonment or removal of its tracks on Pacific Avenue in accordance with agreement made with the City of Dallas. (See certified copy of order of the Railroad Commission of Texas, page 101 of the printed record.)

The 14th Amendment does not limit the subjects over which the police power of a State may be exercised for the protection of its citizens.

Barbier vs. Connolly, 113 U. S., p. 27.

Missouri Pacific Ry. vs. Humes, 115 U. S. p. 512.

The facts in the case at bar evidence the urgent necessity for the exercise of this police regulation, as both the safety and the health and convenience of the public are involved in its enforcement.

IV

It was proper that the Court should have dismissed the bill of appellants herein when it was advised that appel-

lants had resorted to the State courts to obtain the same relief as against the same parties, and that an injunction had been obtained in the State courts, and that this injunction was pending at the time of the trial of this case.

Appellants having elected to commence their suit in the State court against the same parties who are defendants in this cause, and, having obtained injunctive relief, are not in a position in this cause to have the Court below pass upon the question as to whether or not an injunction should be granted them.

As an injunction had already been obtained covering the same matter in the State courts, the United States District Judge was not in a position to exercise his judgment in this case, as, in the event he had held that the appellants were not entitled to an injunction, he would have been in conflict with the decree of the State court which had already passed upon the matter, and the decree would have had no effect upon the final decree in the injunction suit in the State court then pending on appeal. It was proper that the Court should exercise its judgment in refusing to take any action under these conditions.

The appellants invoked the jurisdiction of the State court and obtained an injunction and were not in a position to obtain the relief sought by them in this cause.

Under the above facts and propositions of law appellees respectfully submit that Armour & Company constructed their plant on Pacific Avenue with full knowledge of the fact that the main line tracks of The Texas & Pacific Railway Company, in their operation, and the industry track serving Armour's plant, were at all times subject to the exercise of reasonable police regulations by the City of Dallas, and with full knowledge of the fact that the franchise granted to The Texas & Pacific Railway Company to

construct said industry track expressly provided that same was granted subject to any action the City might take to require The Texas & Pacific Railway Company to abandon its tracks on Pacific Avenue or to change the grade of said tracks either by raising or lowering.

This right is expressly reserved and set forth in the ordinance itself. (See page 24 of the printed record.)

The conditions surrounding the location of that portion of The Texas & Pacific Railway Company's tracks on Pacific Avenue in the City of Dallas which are sought to be changed are peculiar. The tracks are located through the business center of the city, or, rather, after the tracks had been constructed originally, the city grew up around them. The tracks of the company run east and west and the traffic of the city, crossing said tracks, runs north and south. The operation of that portion of the tracks which is sought to be removed is a menace to the safety of the public and seriously interferes with the conduct of public business and public affairs in the City of Dallas.

Owing to the fact that these Pacific Avenue tracks cross the Trinity River, the Trinity River being on the western boundary of the City of Dallas, it is not practicable to lower the tracks so as to have a separation of grades as the Trinity River at various times is subject to high water and overflows, and a lowering of the tracks on Pacific Avenue would result in the tunnel being flooded repeatedly by high water. (See testimony of J. L. Lancaster, page 102 of the printed record.)

Raising the tracks so as to have a separation of grades would not only entail an enormous expense, approximately two million dollars ($2,000,000), and an enormous expense to abutting property owners in order to conform their business houses to the raised grade, but would also impair the

use of Pacific Avenue as a thoroughfare and would not remove the nuisance of noise, vibration, smoke, dust and cinders, caused by the operation of trains over the raised grade. (See testimony of J. L. Lancaster, page 106 of the printed record.)

The Texas & Pacific Railway Company is not abandoning its franchise granted by the City of Dallas to operate its trains through the City of Dallas, nor could the City of Dallas require it to abandon same. It is only agreeing with the City of Dallas that it will shift its tracks to some other portion of the city and make arrangements for the use of some other franchise over another portion of the City of Dallas, so as to abate the present nuisance and aid the city in the exercise of its reasonable police powers.

Long prior to the time Armour & Company constructed their plant on Pacific Avenue and obtained the industry track serving same the question had been agitated in Dallas of removing the tracks of The Texas & Pacific Railway Company from Pacific Avenue, or lowering or raising same and the City Council of the City of Dallas had this in mind when they enacted the ordinance on the 10th day of July, 1912, authorizing The Texas & Pacific Railway Company to construct this industry track to Armour's plant and, having this in mind, they inserted the following provisions in the ordinance:

> "Sec. 2. That the right, privilege and franchise hereby granted is granted subject to the City Charter of the City of Dallas, and such future charters and ordinances as may hereafter be passed, and the city expressly reserves the right to at all times amend or alter the ordinance hereby granted.
>
> "Sec. 3. That the right and privilege hereby granted is granted for a period of twenty years from

> the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific Avenue, then in that event this franchise shall be subject thereto. * * * "

These provisions and these conditions were not embodied in the ordinance except for a specific purpose, that purpose being to retain in the city the right to cancel this ordinance if it saw proper should it become necessary to change the tracks of The Texas & Pacific Railway Company on Pacific Avenue either by lowering, raising or removing same. The fact that The Texas & Pacific Railway Company and its Receiver consented to the change of location of the tracks does not in any way impair the right of the city to exercise its reasonable police regulations in this matter. This arrangement is but the means agreed upon between the company and the city for the carrying out of a reasonable police regulation, and the carrying out of which can not in any wise be obstructed or interfered with by the appellants herein, as whatever rights they may have obtained in said industry track under said ordinance, or otherwise, were taken expressly subject to the right of the City of Dallas to exercise such a reasonable police regulation.

The peculiar conditions affecting the location of the tracks of The Texas & Pacific Railway Company on Pacific Avenue necessitated an agreement of this nature. The tracks cannot be lowered, and raising them would not abate the nuisance or in any wise relieve the situation. Under these conditions the city and the company are attempting to agree upon the exercise and the carrying out of a reasonable police regulation with the least possible damage to parties affected thereby.

Both the railroad company and its Receiver and the city are acting with full authority and in accordance with the laws of Texas, which laws expressly provide for the relocation of tracks of railway companies. This act is referred to as expressing the public sentiment upon matters of this nature. Armour & Company have no vested rights in location of The Texas & Pacific Railway Company's tracks on Pacific Avenue or elsewhere, especially in view of the fact that The Texas & Pacific Railway Company accepted the conditions of the ordinance and Armour & Company accepted the conditions of the ordinance authorizing the construction of the industry track to their plant with full knowledge of the fact that the City of Dallas would desire a change on Pacific Avenue, and the city retained the right to make this change when it became necessary. (See ordinance, page 24 of the printed record.)

If Armour & Company had any vested rights it is only in the maintenance of the industry track to their plant. No law or decision ever prohibited the change of location of an industry track or its abandonment. The only law applicable to such a situation is that if same is removed by parties who agree to maintain same. action for damages might lie against them for breach of their contract.

Brown & Sheldon vs. Warner, 78th Texas Supreme Court, p. 543.

But Armour & Company in this instance have no cause of action for damages against anyone; not against the Receiver, for the Receiver had full authority to abandon the track even though put in under a contract, and his abandonment would not subject him to suit for damages.

Not against The Texas & Pacific Railway Company or the City of Dallas, for by express terms of the ordinance

providing for the construction of this industry track there was embodied specific limitations and conditions, limitations and conditions written into said ordinance for the express purpose of meeting a situation such as appellants are now complaining of. As before stated, the question of removing the tracks of The Texas & Pacific Railway Company on Pacific Avenue in Dallas had long been agitated prior to the ordinance under which this track was constructed. The reasons for embodying Sections 2 and 3 of the ordinance are to be read in the light of conditions then existing. The city unquestionably intended to reserve the right to cancel the ordinance at any time it saw proper when it became necessary to take any action to require the removal of the tracks off Pacific Avenue, and Armour & Company constructed their plant with full knowledge of this ordinance and subject to all of its terms and conditions, and if Armour & Company had any contract with the city of Dallas growing out of this ordinance said contract was made expressly subject to all of the terms and conditions of the ordinance.

Under these conditions we respectfully submit that these tracks being removed by the exercise of a police regulation, if Armour & Company suffer any damage it is either *damnum absque injuriae*, or, in the theory of the law, they are compensated for it by sharing in general benefits which the regulations are intended and calculated to secure.

C., B. & Q. R. R. Co. vs. Nebraska, 170 U. S., p. 77.

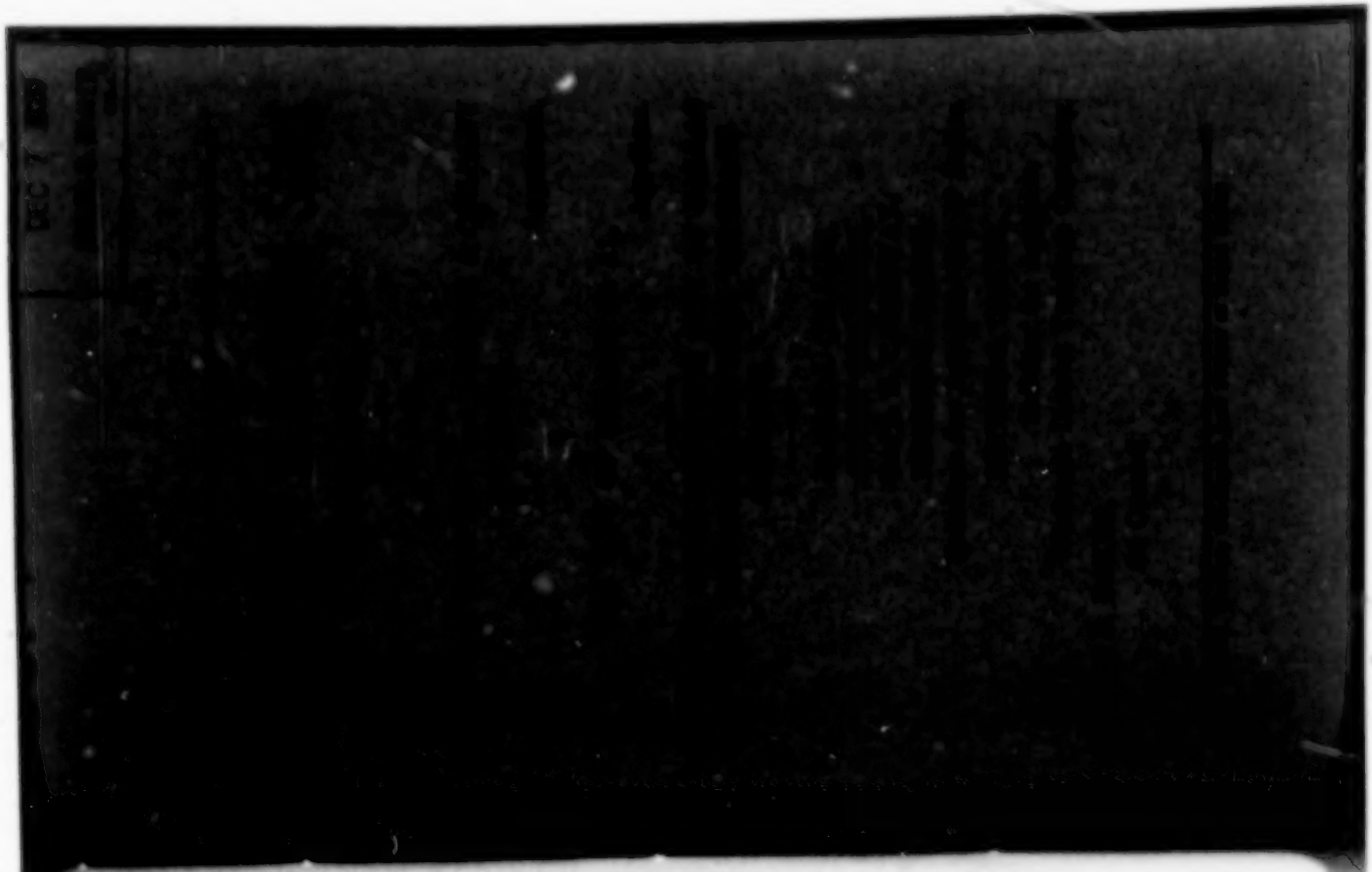
Armour & Company had no vested rights in said industry track, or in its operation, or in the main line tracks of The Texas & Pacific Railway Company on Pacific Avenue, and that same may be abandoned or taken up at any time

by an arrangement between the City of Dallas and The Texas & Pacific Railway Company in the enforcement of a reasonable police regulation.

We respectfully submit that, under the authorities, and under the facts in this cause, the Court below did not err in finding for the defendants and in dismissing the appellants' bill, and we respectfully ask that the decree of the District Court be affirmed.

THOMAS J. FREEMAN,

Solicitor for Appellees, The Texas & Pacific Railway Company, and Pearl Wight, Receiver.



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"In the event the Railway Company **shall be required to abandon,** to elevate or to place in subways **said main tracks on Pacific avenue,** then in that event **this franchise shall be subject thereto.**" 16

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Where the evidence, as in the instant case, shows that the City Charter provided for a continuing tax levy of twenty-five (25) cents upon the $100 valuation, thereby creating a special fund for street improvement work, and that such tax produces annually $360,000, such levy is the equivalent of an appropriation required by the Charter of the City of Dallas and the Constitution of the State of Texas (R. 128-9 and 131) 17

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TABLE OF CASES.

AUTHORITIES.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 149.

ARMOUR & COMPANY and ARMOUR & COMPANY OF TEXAS,

Appellants,

v.

THE CITY OF DALLAS, Et Al.,

Appellees.

BRIEF FOR APPELLEES, THE CITY OF DALLAS and THE WHOLESALE DISTRICT TRACKAGE COMPANY.

STATEMENT.

In connection with the statements made by Appellants and Appellee, the Texas & Pacific Railway Company, we beg leave to submit to the Court the following additional statement:

Requisite diversity of citizenship among the parties to the suit sufficient to support jurisdiction of the Federal Courts not appearing, jurisdiction in the Federal Courts is claimed upon the theory that certain of appellants' alleged rights, which were said to be protected by the fifth amendment, the fourteenth amendment, and a portion of Section X of Article 1, of the Constitution of the United States, were about to be infringed by appellees (R. pp. 8-24-29).

Pacific avenue is a thoroughfare of the City of Dal-

las, located adjacent to and parallel with Commerce, Main and Elm streets of the city, they being the three principal business streets of said city. Pacific avenue is crossed by Lamar, Griffin, Akard, Ervay, Harwood and Preston streets, all important and much traveled thoroughfares of the City of Dallas. Appellee, The Texas & Pacific Railway Company, has two main tracks and numerous switch tracks on said Pacific avenue. The tracks and switches on said avenue are so extensive and numerous and the operation of the Railway Company's trains, engines and cars over said street so numerous as to practically destroy said avenue as a public thoroughfare and to endanger the life, limb, comfort and health of the citizenship of the City of Dallas who are compelled to cross said avenue in the conduct of their personal affairs and business. There are over one hundred trains operated daily on said avenue by the Railway Company. Pacific avenue is the dividing line between North and South Dallas and possibly seventy per cent of the population of Dallas lives north of said avenue and are consequently compelled to cross said avenue in coming to and going from business section of the city. The use of the said avenue by the appellee Railway Company became so burdensome and oppressive as to imperatively demand that the City of Dallas take some action, prompt and efficient, to relieve the situation and to protect the life, limb, comfort, safety and welfare of the citizenship of the City of Dallas. In obedience to such demand, the City of Dallas heretofore passed certain valid police regulations with reference to the use of the public highways, streets and ways of the said city by railway companies which were not being observed by defendant railway com-

pany. The City of Dallas further threatened, intended and would, but for the action of defendant Railway Company in signing the contract set forth in plaintiff's said petition, have passed other ordinances regulating and controlling the use of said avenue by defendant Railway Company, and denying the use of said avenue by defendant Railway Company between Lamar street and Central avenue in the City of Dallas. The Texas & Pacific Railway Company could not have operated its trains over said avenue and complied with the reasonable police regulations, ordinances and demands which the City of Dallas heretofore made, and which they would have made except for the agreement with the said Railway Company, as aforesaid, and said Railway Company, realizing and acknowledging such to be a fact, agreed with the City of Dallas upon a relocation of a small segment of its tracks upon said Pacific avenue.

It is not contemplated that the Texas & Pacific Railway Company shall abandon its right to operate its trains into and through the City of Dallas or to abandon the use of Pacific avenue except upon the small segment between Lamar street and Central avenue in said City. But it is contemplated that the tracks of defendant Railway Company shall be removed from the small segment on Pacific avenue and shall be located at some other point in the City of Dallas, and such removal is made in obedience to the imperative demands of the public welfare. It is contemplated by the contract that the defendant Railway Company and its Receivers shall be given easements and franchises on, over and along other portions of the said City; the public interest demands that the removal of the tracks as con-

templated in the said contract (R. 68 and 69, 104-105).

By its supplemental answer, appellee declares that the provisions of the City Charter relating to contracts do not contemplate a contract of the character entered into and complained of by the said appellant, and therefore the Auditor's signature was not necessary. That if the contract complained of by appellants falls within the class of contracts referred to by the Charter, then the Auditor did not sign the same for the reason that the said appellants had filed their bill for an injunction in the United States District Court for the Northern District of Texas on the 21st day of December, A. D. 1918, and during the pendency of the said suit filed another bill for an injunction against the defendant and its co-defendants in the 66th District Court of Texas and obtained a temporary restraining order against appellees and the co-defendants from carrying out the terms of the contract. That in said bill in the State Courts the appellants urged that the contract was void, for, among other reasons, that the same violated Section 42 of Article XIV of the Charter (R. 71, 72 and 73; also R. 129, Stipulations of Fact and also Decree of Court, R. 74).

APPELLEES' COUNTER PROPOSITIONS.

I

THE JURISDICTION OF THIS COURT.

1. When the jurisdiction of this Court is invoked upon the alleged ground that the litigant is enjoying a valid contract, the obligation of which is about to be impaired, through unconstitutional State or Municipal

action, the facts must substantially show the **existence** of a contract and its **unjustifiable** impairment, or jurisdiction fails.

2. Where jurisdiction of this Court is invoked on the ground that through State or Municipal action a person is about to be deprived of property without due process of law, the **existence of the property** and the **unconstitutional** appropriation of same must appear, or jurisdiction fails.

3. Where jurisdiction of this Court is invoked on the ground that private property is about to be taken for public use without just compensation, the **existence** of the property and the **unconstitutional** taking of same must appear, or jurisdiction fails.

REMARKS.

The transactions narrated in the Bill of Appellants as the basis of their claim, were transactions originally had by Armour of New Jersey with appellees, the interests of Armour of Texas being derivative. It is by virtue of transactions between appellants that Armour of Texas claims only to have succeeded to the alleged rights which are claimed to be protected by the Federal Constitution. Accordingly, Armour of New Jersey figures most prominently in the story.

Neither of the Armour Companies ever made any contract with the Railway Company or the City of Dallas, or ever acquired any vested property interests in the switch track constructed by the Railway Company through any arrangement with or purchase from or estoppel against the Railway Company or the City of Dallas.

Armour of New Jersey, in its purchase of the Dallas

property from the original owners of same, was represented by its attorney, W. M. Short, and its land man, S. S. Jerome.

Mr. Short's testimony appears in the record at pages 125-131. His testimony affirmatively shows that no contract respecting the construction or maintenance of the switch was ever made by Armour of New Jersey with any of the appellees, and that no vested right to keep the switch in place and in operation was ever obtained by Armour of New Jersey.

Mr. Short testified:

> "As representing Armour & Company, I had oral negotiations with both Everman and Hall about the purchase of said lot and the construction of a switch, and both of them were advised that the purchase of the lot was upon the conditions stated" (R. p. 126).
>
> Everman "was connected with the Texas & Pacific Railway Company as General Manager, with headquarters at Dallas" (R. p. 125).
>
> Hall "was General Attorney of the Texas & Pacific Railway Company, with his headquarters at Dallas" (R. p. 125).

To Mr. Short, Everman and Hall expressed their opinion that the City could not require the Railway Company to remove its tracks from Pacific avenue (R. p. 126).

The stated negotiations and conversations of Mr. Short with Messrs. Everman and Hall is as near as Mr. Short ever approached the making of a contract. Indeed, Mr. Short seems not to have attempted to secure a contract with any of the appellees respecting the switch track in question.

Mr. Jerome's testimony appears at page 135 of the Record, and his nearest approach to the contract matter is his statement that Mr. Everman knew of the condition in the contract to purchase the lot, and assured him that if the City granted the franchise, the Texas & Pacific Railway Company would put in a switch and maintain and operate it, and that acting upon these assurances, he, on behalf of Armour & Company consummated the contract for the purchase of said lot which he otherwise would not have done (Record, p. 135).

The authority of Everman and Hall even to make contract of the character in question on behalf of the Railway Company does not appear and obviously a promise by Everman that the Railway Company would put in a switch and operate it falls short of being an enforcible contract.

As to the necessity of proof of authority in Everman, see:

K. C. M. & O. Ry. Co. v. Sweetwater, 104 Tex. 329.
Logue v. Southern Ry. Co., 106 Tex. 445.
Mo. Ry. Co. v. Hood, 172 S. W. 1120.

Everman testified that there was no written contract or agreement made with Mr. Jerome.

> "We expected to submit our proposed form of contract for consideration and induce the beneficiary of the contract to sign it if it was possible to do it. We had a standard form of contract for industry tracks, and with strict instructions to be governed by the conditions of it. Armour & Company were requested to sign the industry contract. Mr. Jerome would not sign it. He took exception to certain of the conditions and I told him we couldn't change the conditions at all and finally it was put in without his signature. I consider it

> our industry track. I consider that we had much better right to use it and greater privilege of using it for other business if no contract was signed covering it. When Armour & Company signed no contract for it, I consider this track ours" (R. p. 181).
>
> "That standard form was adopted, and parties who want industry tracks were required to execute the standard form. It has a contract for the management of the property and that standard form was presented to Armour & Company in this instance and they refused to execute it. The Texas & Pacific Railroad paid for the construction of this track, for the ties, grading, fastenings and labor. Armour & Company paid nothing" (R. p. 181).

The switch track is entirely in Pacific avenue, and does not rest upon or physically touch appellants' property.

The permit granted by the City of Dallas to the Railway Company for the construction of the switch track ran only to the Railway Company and was not assignable. It was made subject to the City Charter and ordinances of the City of Dallas and therein the City expressly reserved the right to amend or alter the same, and it became automatically subject of course to the State Constitution (R. pp. 37-40).

It cannot fairly be claimed that appellants ever made any contract with appellees or acquired from appellees any rights under the franchise in question.

AUTHORITIES.

Mayor of Houston v. Houston City Railway, 83 Texas 548.

Storrie v. Houston City Railway Company, 92 Texas 129.

San Antonio Traction Company v. Altgelt (Texas), 81 S. W. 106.

San Antonio Traction Co. v. Altgelt, 200 U. S. Reports 304.

D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

Western Union Telegraph Co. v. Richmond, 224 U. S. 160.

City of St. Louis v. United Ry. Companies, 210 U. S. 264.

S. W. Telegraph & Telephone Co. v. City of Dallas, 174 S. W. 636.

(Writ of Error refused by Supreme Court of Texas).

Ennis Water Works v. City of Ennis, 233 U. S. 652.

Seaboard A. L. Ry. Co. v. Raleigh, 242 U. S. 15.

II

Appellants' legal remedy is adequate and complete and no allegation or facts appear disclosing financial irresponsibility of the Railway Company or the City. Accordingly the bill is not maintainable in equity.

REMARKS.

Substantially the same state of facts which is presented in this record was presented in another suit between appellants and the Railway Company respecting this same matter and therein it was decided by the Circuit Court of Appeals for the Fifth Circuit that appellants' remedy, if any, was at law. Armour & Company v. Texas & Pacific Railway Company, 258 Federal, p. 185.

III

Because the jurisdiction of the Federal Court in this

case is made to rest upon the threatened invasion of constitutionally protected rights, appellants must first show the existence of rights so protected and threatened invasion of same, and, failing on these issues, cannot aid their bill by urging other questions not involving Federal issues.

REMARKS.

The points made by appellants in and under their assignments of error, 4th to 9th, inclusive, are in the category referred to in the foregoing counter proposition. These points all relate to alleged irregularities in the contract between the City of Dallas and its co-appellees (to which contract appellants were in nowise parties). They throw no light upon the constitutional issues urged by appellants.

AUTHORITIES.

Dallas Electric Company v. City of Dallas (Tex.), 58 S. W. 153.

Martin v. Lankford, 245 U. S. 547.

IV

The exercise by a Federal Court of its discretionary right to refuse an injunction will not be revived on appeal where the complaining party has elected concurrently to pursue another application for injunction respecting the same matter in state courts of co-ordinate jurisdiction.

REMARKS.

While the instant suit was pending, untried, in the Federal Court, complainants, joined by their counsel

as co-complainants, filed another bill against appellees herein respecting this same controversy in the state courts of Texas, and obtained temporary injunction (R. p. 204). Defendants in that bill perfected an appeal which was stipulated to be still pending at the time the Federal District Court heard and decided the application for injunction contained in the bill in this cause (Record, p. 204).

V

It affirmatively appears from the Charter of the City of Dallas offered in evidence by appellants, that the Board of Commissioners possessed the express power to authorize steam railroads operating their lines from the City of Dallas to other cities beyond its limits, to lay their tracks and establish their switches on the streets or other property of the City, but subject only to the terms of the Charter and under such conditions as may be imposed by the Board of Commissioners. It does not appear from the appellants' petition or evidence adduced upon the trial that any authority existed in the City of Dallas under its charter or otherwise, to confer upon the appellants the right or exclusive use of said switch tracks nor does it appear that the authority existed in the said appellants to accept such a right and lawfully exercise the same.

AUTHORITIES.

Article II, Sub-division 18 of Section 8 of the Charter of the City of Dallas (R. 78).

(See petition of Appellants, R. pp. 1, 5, 10 and 13).

VI

The granting of the switch track ordinance to the

Texas & Pacific Railway Company in this case was the exercise of a legislative power conferred upon the City of Dallas by the State over its public streets which can only be exercised in behalf of the general public, and it would be incompetent for the City to grant a franchise for the use of its streets for the private uses of any citizen.

AUTHORITIES.

McQuillan on Municipal Corporations, Sec. 1363, Vol. III, page 2923.

McQuillan on Municipal Corporations, Sec. 1627, Vol. IV, p. 3403.

Glaessner v. Anheuser Busch Brewing Assn., 13 S. W. 707.

Charles Fustafson v. Theodore Ham, L. R. A., Vol. 22, p. 565.

State Ex Rel. St. Louis Underground Service Company v. Murphy, 31 S. W. 784 and 34 S. W. 51.

Elliott on Roads and Streets, Sec. 1048, Vol. II, p. 571.

VII

It is incompetent for the Legislature of Texas or a municipality to grant the exclusive use of its streets to any person or corporation.

AUTHORITIES.

City of Brenham v. Waterworks Co., 67 Texas 543; 45 S. W. 143.

Ennis Waterworks Co. v. Ennis, 136 S. W. 513; Affd. 144 S. W. 930.

VIII

A citizen has no vested right in a contract made between a municipality and a public utility, though made for his benefit, and he cannot prevent the municipality from modifying or abrogating the contract so that he will be deprived of the benefits thereof.

AUTHORITIES.

Asher v. Hutchinson Waterworks Co., 66 Kansas 496; 71 Pac. 813; 61 L. R. A. 52.

Little Rock Ry. & Elec. Co. v. Dowell, et al., 101 Ark. 223; 142 S. W. 165; Ann. Cases 1913-D 1086.

Mangan v. Texas Transportation Co., 44 S. W. 998.

IX

It affirmatively appears that the contract rights alleged to exist by the appellants grow out of the relationship established by the ordinance granting the right to construct and maintain the switch tracks, therefore, appellants took their rights subject to the laws of the State of Texas, the terms of the said ordinance and the inalienable police powers of the City of Dallas.

AUTHORITIES.

D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

Elliott on Roads and Streets, Vol I, Sec. 85, p. 105.

Morel v. S. A. & A. P. Ry. Co., 177 S. W. 1049.

Elliott on Railroads, Sec. 1082, Vol. III, page 12.

X

The fact that the City Auditor did not sign the agreement between the City, The Wholesale District

Trackage Company and the Texas & Pacific Railway Company is not a defect in the contract which the appellants would in law be allowed to take advantage of.

AUTHORITIES.

Dallas Electric Co. v. City of Dallas, 23 Texas Civ. 323-327; 58 S. W. 153.

XI

If the completion of the agreement between the City, The Wholesale District Trackage Company and the Texas & Pacific Railway Company for the removal of said tracks from Pacific avenue, was interrupted by the conduct of appellants in instituting legal proceedings in the courts and obtaining temporary injunction against the City on such grounds, the appellants cannot be heard in a Court of Equity to complain of the same.

AUTHORITIES.

10 R. C. L., Sec. 141, page 392.

See Stipulations of Facts, R. 129.

XII

Where a contract is affected by a public interest, a Court of Equity will not interfere with such public interest or ignore the same in order to grant relief to a complainant under said contract.

D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

AUTHORITIES.

Armour & Company, et al., v. Texas & Pacific Ry. Co. and Pearl Wight, in the Circuit Court of Appeals, 5th Circuit, 258 Fed. Rep., p. 185.

Beasley v. Texas & Pacific Ry. Co., 191 U. S. 492.

Texas & Pacific Ry. Co. v. City of Marshall, 136 U. S. 104.

Northern Pacific Ry. Co. v. Territory of Washington, 142 U. S. 492.

XIII

The switch track ordinance granted by the City to the Railway Company was granted and could be granted only for the use of the general public and not for the private use of appellants, although appellants may receive private benefits and advantages under the same, therefore, appellants took no higher right into the switch tracks than may be enjoyed by the general public.

AUTHORITIES.

Mangan v. Texas Transportation Co., 44 S. W. 999 and particularly page 1001.

Rhinehart v. Redfield, 87 N. Y. State 789; 93 Appeal Division 410; Affd. 179 N. Y. 569; 72 N. E. 1150.

XIV

An individual can acquire no vested right as against the public in the continued service of a public utility and such rectification of a railway line as the public interest might dictate can be made, notwithstanding disadvantage to private business or injury to private contracts.

AUTHORITIES.

Wyman Public Service Corporations, paragraphs 307 and 318.

Elliott on Railroads, Vol. I, paragraphs 363, 364, 386, 387 and 388.

Hoard vs. Railway Company, 123 U. S. 222 and 227, 31 L. Ed. 130.

Ford v. Railway Company, 117 Pac. 809.

Scholten v. Railway Company, 73 S. W. 915.

Whalen v. Railway Company, 17 L. R. A. (N.S.) 130.

XV

The Franchise Ordinance which forms the basis of appellants' action contains the following provision:

> "In the event the Railway Company shall be **required to abandon**, to elevate or to place in subways **said main tracks on Pacific avenue**, then in that event, **this franchise shall be subject thereto.**"

The facts in evidence show that the Railway Company could not successfully operate its trains upon Pacific Avenue and comply with the reasonable police regulations then in effect and those which the City was threatening to pass and enforce, and further, that the City had the Charter power to compel the Railway Company either to place its tracks underground or to elevate same above the surface of the street, and that the Railway Company was financially unable to comply with either requirement. Confronted by such a situation, the Railway Company was not compelled to await the outcome of an unsuccessful conflict with the City, but could admit and acknowledge the rights and power of the City in the matter and contract to remedy the situation, and acting under such compulsion, the Railway Company was "required to abandon its main line tracks" under the terms of the Franchise grant.

REMARKS.

The provision of the Franchise grant is correctly quoted in the foregoing proposition (R. 25).

The City had the Charter power to compel the Railway Company either to place its tracks underground or to elevate them above the surface of the ground (R. 91).

The Railway Company could not successfully operate its trains upon Pacific Avenue and comply with the reasonable police regulations then in force and those which the City was threatening to pass and enforce (See testimony of Mr. Lancaster, R. 102-114).

The Railway Company was not in a position to finance placing its track underground or overhead (R. 103); D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

XVI

Where the evidence, as in the instant case, shows that the City Charter provided for a continuing tax levy of 25 cents upon the $100.00 valuation, thereby creating a special fund for street improvement work, and that such tax produces annually $360,000.00, such levy is the equivalent of an appropriation required by the Charter of the City of Dallas and the Constitution of the State (R. 128-9 and 131).

XVII

The parties having stipulated herein that "**Appellants' prayer for injunctive relief is hereby limited to the removal of said switch track and so much of the main track East of Appellant's plant as may be essential to the maintenance and operation of said switch track,**" this Honorable Court will not consider any

question other than the right of appellants to enjoin the removal of the switch track serving their plant. That question was determined adversely to appellants' contention in the case of Armour & Company vs. Texas & Pacific Railway Company, 258 Fed. 185.

XVIII

It affirmatively appearing that if appellants are granted an injunction to prevent the removal of the switch track serving their plant, such injunction will inevitably and necessarily require the Texas & Pacific Railway Company to maintain its main line track across four important streets of the City of Dallas, to-wit: Swiss avenue, Olive street, Pearl street and Harwood street, and it affirmatively appearing from the Record that such streets are principal thoroughfares of the City of Dallas, and the public interest imperatively requires and demands the removal of all railway tracks thereon, the Court should deny equitable relief and remit the parties to their action at law.

REMARKS.

See Stipulation of parties hereto (R. 129).

Preston, Olive, Pearl and Harwood Streets (particularly Harwood Street) are principal thoroughfares of Dallas over which the traffic is heavy (R. 106, 120 and 124).

SUMMARY.

We respectfully submit to the Court that this case is ruled by Armour & Company, et al., v. Texas & Pacific Railway Company and Pearl Wight, supra, and the appellants are without equitable relief. An analysis

of the appellants' case will show clearly that at the time the Ordinance was passed granting the switch track right to the Texas & Pacific Railway Company as well as prior thereto, an anxious concern was exhibited by the City in reserving in express language the power to act in the event the said Railway Company should be required to abandon, elevate or place in subways, said main tracks on Pacific Avenue; that in such event the switch track franchise should be subject thereto (R. 25, Sec. 3 of Ordinance; also testimony of J. E. Lee, R. 124).

The Ordinance also reserved the right to amend or alter the Ordinance and made it subject to the Charter and Ordinances then existing, and such future Charter and Ordinances as may be thereafter passed (R. 25; Sec. 2 of Ordinance).

It is further provided by Section One of said Ordinance that the right, privilege and franchise granted to the Texas & Pacific Railway Company was subject to the following conditions, **a violation of any one of which or a misuse or abuse of same would constitute a sufficient ground for the forfeiture of the entire right, privilege and franchise** (R. 24).

It will be observed that the only legal conclusion that can be drawn from the instrument is that it does not intend to confer an irrepealable or uncontrollable or indefeasible vested right in either the Railway Company or Armour & Company to use the said tracks for the entire period of twenty years. The Armour & Company made its dedication subject to the terms of this ordinance. It well knew that public demand may create the necessity whereby the said Ordinance may be changed or modified or that the same may be entirely

abandoned. It could understand nothing else from the plain language used or the circumstances existing at the time.

The evidence in the record is overwhelming in its conclusive nature to the effect that both the City and the Railway Company understood the public necessity for the removal of the tracks. (See recommendation of W. M. Holland, Mayor of the City of Dallas, R. 91. Also action of the City against Railway Company, R. 93; also Report of City Engineer as appears at bottom of page 94 to page 98 relating to abolishing of grade crossings. Also Section 105, on page 98 of Record, action of the City requiring gates, etc., also as shown on page 99, petition of Railway Company to Railroad Commission of Texas for permission to remove tracks from Pacific Avenue between Griffin and Preston Streets; also as shown on page 101, Judgment or Order of Railroad Commission upon said application, which judgment in part says:

> "That the removal of the tracks of the petitioners now located upon Pacific Avenue between Preston Street and Griffin Street in the City of Dallas, and the relocation of the same and the roadbed of their line in the vicinity of said locality, and the re-arrangement of their tracks on said Avenue, between Lamar Street and the West line of Griffin Street, will have the effect of reducing the grades of their lines within said City, and will **serve the public interests by promoting the public safety and convenience.**"

These are the facts found by the Railroad Commission of Texas (R. 191). Also see testimony of J. L. Lancaster, Vice-President of the Texas & Pacific Railway Company, page 105 to 107 of Record. Also testi-

mony of Fletcher F. McNeny, on page 129 of the Record. Also consent of Wm. G. McAdoo, Director General of Railroads, page 169 of the Record.

The Appellants do not combat the proof that an overwhelming public demand existed and was recognized by both the City and the Railway Company as well as the citizens in general, that the existence of the said tracks on Pacific Avenue made a dangerous menace to the life, limb and convenience of the general public as well as a detriment to their property rights.

We believe that no other conclusion can be reached than that the necessity existed for action. The fact that the City chose to act by way of an agreement rather than by an Ordinance does not change the necessity for action. The City had the legal right and discretion to adopt any mode it chose to accomplish the result.

With reference to the contract agreement between the City, The Wholesale District Trackage Company and the Texas & Pacific Railway Company complained of as being invalid for want of the signature of the City Auditor and for failure to provide a fund to pay the One Hundred Thousand Dollars complained of by Appellants, we respectfully submit that it affirmatively appears by the Record on page 127, from the testimony of W. W. Peevey, who was then City Secretary of the City, that the said Peevey failed to present the same for signature to the said Auditor (R. 127).

It also affirmatively appears from the testimony of R. V. Tompkins, the City Auditor at that time, and the present time, that he did not sign the same (1) because it was not called to his attention, and (2) because the City was under an injunction brought in the State Courts by the Appellants, from carrying out the said

contract, and that one of the grounds urged in the said suit was the fact that it was not countersigned by the Auditor (R. 128).

It further appears from the testimony of the Auditor that an annual twenty-five cent levy is made by the City Charter to take care of Street improvements and that the One Hundred Thousand Dollars complained of by Appellants was chargeable to this fund (R. 129). Also on page 131 of the Record the Auditor testifies as follows:

> "Q. In view of your statement of the accounts of the City, are you ready, if the injunction is removed to countersign the contract as Auditor?"

To which question the Auditor answered, over the objection of appellants:

> "A. Yes" (R. 131).

We submit that in view of the special tax levied for street improvements, the Constitution of the State was literally complied with in creating the obligation.

We beg to further state that in view of the Record and particularly by the stipulations entered into by the appellants as appears on page 11 of appellants' brief, the appellants cannot be said to be seriously objecting to the One Hundred Thousand Dollars payment by the City for the real estate desired to be acquired under its agreement with the Trackage Company and the Railway Company. It will be observed that the obligation in the agreement insofar as it relates to the City, may be stated succinctly as follows:

The City obligates itself:

(1) To grant certain franchise rights to occupy streets in a proposed industrial district to be created.

(2) To abandon a certain portion of Pacific Avenue "lying west of the switch track in controversy" and permit the same to be used by the Railway Company.

(3) That it will pay the Trackage Company One Hundred Thousand Dollars in consideration for the real estate to be conveyed to it by the Trackage Company, and shall use all of the real estate in opening and extending Pacific Avenue between Griffin and Lamar Streets (R. 26).

We beg to state that the real estate proposed to be purchased lies West of the Appellants' property at the extreme end of the proposed track removal. The stipulation, as appears on page 11 of appellants' brief, in substance says:

> "That during the pendency of the appeal herein, the switch track serving the Appellants' property shall be maintained and operated, and **that all other tracks on Pacific Avenue West of Appellants' plant may be removed,** and that all other tracks on Pacific Avenue East of Appellants' plant not necessary for the maintenance and operation of said switch track may be removed and such removal shall not be held to constitute a contempt of this Court, and **Appellants' prayer for injunctive relief is hereby limited to the removal of the said switch track and so much of the main track East of Appellants' plant as may be essential to the maintenance and operation of the said switch track, etc.** * * *" (R. 19).

Thus, it affirmatively appears that appellants are not interested in the expenditure of the money for the removal of the tracks West of their plant. The agreement setting out the City's obligation appears on page 26 of the Record.

We respectfully submit that under no consideration can the attack made by appellants against the contract be sustained either in view of the law or the facts in the case. We further beg to assert that The Wholesale District Trackage Company, as shown by the testimony, is merely an agency created by the interested property owners for the purpose of aiding and assisting in carrying out this improvement. Its purpose, as shown by the agreement as well as the testimony, is to acquire certain rights in behalf of the Railway Company in the new Industrial District, as well as to aid in the collection of voluntary assessments made upon the citizens (R. 117, testimony Fletcher F. McNeny).

We respectfully submit the foregoing authorities and request that the propositions of law and argument be considered not only in behalf of the appellee, City of Dallas, but also in behalf of the appellee, The Wholesale District Trackage Company.

It is therefore respectfully submitted that the decree of the Court below be sustained.

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CARL B. CALLOWAY,
RHODES S. BAKER,
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RHODES S. BAKER,
Solicitor for Appellee,
Wholesale District Trackage Company.

RHODES S. BAKER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 149.—October Term, 1920.

Armour & Co. and Armour & Co. of Texas, Appellants, vs. The City of Dallas et al.	Appeal from the District Court of the United States for the Northern District of Texas.

[February 28, 1921.]

Mr. Justice Brandeis delivered the opinion of the Court.

In 1872 the Texas and Pacific Railway Company built its single track main line to the West on a street in the village of Dallas, then as now called Pacific Avenue. In 1890 the City granted to the Company a fifty-year franchise to double track its railroad on that street. In the latter year the population of Dallas was 35,057; now it is 158,976;[1] and the existence and operation of the railroad on the Avenue has become a serious menace to life and limb, a great inconvenience to the whole people, burdensome to the Railway, and an injury to neighboring property. North of the Avenue lie largely the residential sections of the City; adjacent and to the South, largely business sections. A part of the Avenue is in the heart of the City. There six of the leading business streets —great thoroughfares—cross it; and on two of them street cars cross the railroad at grade. Two other much travelled streets are parallel. One of these, which is only two hundred feet distant, is the principal business street of the City. The number of trains operated daily over the Avenue had risen in 1918 to more than one hundred; and there were, in addition, switching operations to many neighboring industries. Trains are now longer—some of them consisting of eighty freight cars; and they occasion serious interruption to street traffic. The necessary use of larger engines, due partly to a heavy grade, results in much noise, smoke and

[1] 12th Census, Vol. I, p. 430; U. S. Census Bureau, Population of Cities Having 25,000 Inhabitants or More, 1920.

cinders. Regulations concerning operation of trains imposed by the City in the interests of safety were necessarily severe; and had proved expensive and embarrassing to the Railway. Still further safeguards and restrictions upon operation appeared to be necessary. Plans were proposed for putting the tracks in subways, for elevating them and for eliminating the grade crossings; all of which the City confessedly had power to require of the Railway. But none of these projects appeared to offer a satisfactory solution of the problem. Finally a plan was worked out for the removal of the tracks from this part of the Avenue for a distance of nearly a mile and for diverting the trains to the line of another railroad with which it was proposed to make connections. This involved establishing a wholesale trade district elsewhere.

This plan proved acceptable to the Railway, its receiver, the City and most of the real estate owners affected. In order to carry out the plan the Wholesale District Traffic Company was organized; and this corporation, the City, the Railway and its receiver entered into a contract under which the improvement was to be made. Then Armour & Co., owner of a plant served by a switch track connecting with the main line on the Avenue, and its lessee, brought this suit in the District Court of the United States for the Northern District of Texas against all the parties to the contract seeking to enjoin its performance and specifically the removal from Pacific Avenue of the tracks which connected with their switch track. Jurisdiction of the Federal Court was invoked on the ground that the action proposed would deprive plaintiffs of their property without due process of law and impair the obligation of their contracts in violation of the Federal Constitution. After full hearing on the merits a decree was entered dismissing the bill with costs. The case comes here by direct appeal under Section 238 of the Judicial Code.

First. The basis of the plaintiffs' principal claim is this: In 1912 Armour & Co., being desirous of erecting a plant in Dallas, made a contract for the purchase of a lot on the Avenue, the purchase to be conditioned upon the Railway securing from the City a franchise to lay a switch connecting the lot with its main track on the Avenue and upon Armour & Co. then securing from the Railway an agreement to build and maintain the switch. Upon satisfying it-

self through negotiation with officials of the City and of the Railway that these conditions would be complied with, Armour & Co. completed the purchase of the lot. The City then passed an ordinance granting such a franchise to the Railway for the period of twenty years, conditioned, among other things, upon Armour & Co. dedicating about ninety square feet of their land to the public to round the two corners of their lot. The small parcels were dedicated; the plant was erected; the switch was built by the Railway; and over the switch Armour & Company's lessee customarily receives about 600 cars of freight a year. The plaintiffs contend that the switch franchise, granted by the City to the Railway, was entered into for Armour & Co.'s benefit; that it was, in effect, a contract with them; that the City and the Railway are powerless under the Federal Constitution to abrogate that contract either directly by surrendering the switch franchise or, indirectly, by removing the main track with which the switch connects; and that the plaintiffs are entitled to an injunction, because the plant, which cost nearly $80,000 to build, would lose most of its value if deprived of its rail connection.

To this claim several answers are made: (1) That the City did not make any contract with Armour & Co. and under its charter would have been without power to do so; (2) that the Railway did not make any contract with Armour & Co. to maintain the side track and that it had been authorized to remove the tracks from Pacific Avenue by the Railroad Commission, under appropriate legislation, on the ground that it would "serve the public interests by promoting the public safety and convenience;" (3) that the plaintiffs have already sought and been denied, as against the Railway and its receivers, the same relief here applied for; having intervened for that purpose in the original suit brought for appointment of the receiver in the District Court of the United States for the Western District of Louisiana; that the decree of the District Court therein dismissing its petition asking the same relief had been affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, *Armour & Co.* v. *Texas & Pacific Railway Co.*, 258 Fed. 185; and that this court had denied Armour & Co.'s petition for writ of certiorari, 251 U. S. 551; (4) that even if the franchise had purported to grant an absolute right to maintain

the tracks on Pacific Avenue it would have been subject to the fair exercise by the State, through the municipality as its agent, of the police power to promote the public safety; and that, under the circumstances, removal of the tracks was essential for this purpose since the tracks could not appropriately be placed underground or be elevated. *See Denver & Rio Grande Railroad Company* v. *Denver*, 250 U. S. 241, 244; *Erie Railroad Co.* v. *Board of Public Utility Commissioners et al.*, decided by this court January 3, 1921; (5) that the franchise for the switch was not absolute; that power of revocation had been expressly reserved by clauses in the ordinance which made the franchise subject to the City's charter powers and provided "that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific Avenue, the franchise should be subject thereto"; and that the Railway was so required; (6) that even if plaintiffs had the legal right which they assert, they were not entitled to relief in equity by injunction; since an action at law would afford an adequate remedy and an injunction would interfere with a paramount public interest.

It was on the last of these grounds that the Circuit Court of Appeals in *Armour & Co.* v. *Texas & Pacific Railway Co. et al.*, 258 Fed. 185, unanimously affirmed the decree dismissing the intervening petition. Among the judges sitting upon appeal in that case was the Circuit Judge who entered the decree in this case here under review. He does not appear to have written an opinion in this case but presumably he dismissed this bill also on that ground. For it is clear that the case is not one for equitable relief. If the plaintiffs as abutting property owners have any legal right which is interfered with, an action at law for damages will afford them a full and complete remedy. *See Texas & Pacific Ry. Co.* v. *Marshall*, 136 U. S. 393, 405; *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 496-7. We have no occasion, therefore, to consider any of the other grounds urged for affirming the decree.

Second. Plaintiffs urge, apparently as taxpayers, this additional ground for relief: They allege that the contract entered into by the City is void and that its performance should be enjoined; because the contract therefor was not countersigned by the Auditor and the expense thereof was not charged to the proper appropriation as required by the City's charter. It was agreed that

the plaintiffs had brought a suit on this ground in a state court on behalf of themselves and of other taxpayers of Dallas against the City and others, that it had obtained upon an *ex parte* hearing a temporary injunction restraining the City from carrying out the contract, that this suit was pending on appeal before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas when this case was heard below, and that the temporary injunction, so far as appears, is still in force. The District Court was clearly right, under the circumstances, in refusing to grant an injunction on this ground.

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.